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NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUPER TIRE ENGINEERING COMPANY,

Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 676, Affiliated with the International Brotherhood of Teamsters,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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107 pp

Question Presented

Did the Third Circuit, in conflict with other circuits, err by construing a general "just cause" standard to permit an arbitrator to create a progressive discipline requirement where the collective bargaining agreement specifically waives such requirement in clear and unambiguous language?

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUPER TIRE ENGINEERING COMPANY,

Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 676, Affiliated with the International Brotherhood of Teamsters,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, Chief Justice and Associate Justices of the United States Supreme Court:

Petitioner, Super Tire Engineering Company,[1] a corporation of the State of New Jersey, prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Third Circuit

[1] Super Tire Engineering Company's parent corporation is Super Tire Services, Inc., also located in Pennsauken, New Jersey. There are no subsidiaries or affiliates of either of the foregoing corporations.

reversing the judgment of the District Court in *Super Tire Engineering Company* v. *Teamsters Local No. 676*, 546 F.Supp. 547 (Dist.N.J. 1982).

Opinions Below

The opinion of the Court of Appeals for the Third Circuit (Appendix A at 1a-10a) is reported at 721 F.2d 121 (1983). The decision of the District Court (Appendix C at 13a-26a) is reported at 546 F.Supp. 547.

Jurisdiction

The judgment of the Court of Appeals was entered on November 14, 1983. Rehearing and rehearing in banc was denied on December 12, 1983. Jurisdiction of the District Court and the Court of Appeals is founded upon Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185(a).

Statutory Provision Involved

The statutory provision pertinent to this petition is Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185(a).

Statement of the Case

This case involves the extent to which an arbitrator can interpret a just cause requirement of a contract to override specific provisions which clearly waive any warning notice or the need for progressive discipline before an employer may discharge an employee.

The collective bargaining agreement herein contains a provision[2] which prohibits the employer from discharging employees without "just cause". Another provision enumerates seven specific offenses, including the consumption of alcoholic beverages during working hours, which constitute cause for immediate dismissal without prior warning. In all cases other than the seven enumerated offenses, the employer cannot discharge an employee for a first offense, because the contract requires a prior written warning. Such prior written warning is expressly waived for any of the seven enumerated offenses.

On October 30, 1981, the employer discharged Mitchell Gray, an employee who worked with and around mechanical equipment and had previously served as shop steward, for consumption of alcoholic beverages during working hours, one of the seven enumerated offenses. Gray had been discharged once before for a previous drinking offense on August 31, 1981, but was reinstated (the discharge reduced to a one-day suspension) after intercession by the Union. At the time of his reinstatement he was given a letter by the Company advising him that "There is to be no drinking of alcoholic beverages on Company premises nor during working hours." (Appendix C at 15a)

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[2] Article 15—Section 1. No employee may be discharged or suspended without just cause. . . . Until the case has been discussed with the Business Agent, no employee may be dismissed or suspended *except where the provisions of the Section provide for immediate dismissal. . . . Except in the case of immediate dismissal for the causes set forth below, no employee may be dismissed or suspended for his first offense but shall receive at least one written notice.* . . . The parties agree that causes for dismissal without first discussing the matter with the Business Agent shall be the following:

> (2) *Drunkenness, proven drinking during working hours, or being under the influence of alcohol . . . during working hours.* (Emphasis added). (Appendix F at 64a-65a)

The events herein took place after that letter issued. After the instant discharge, Gray filed a grievance and the matter proceeded to arbitration. The arbitrator found that Gray was guilty of drinking during working hours. (Appendix E at 38a) He also found that the employer would have had just cause for immediate dismissal of Gray, *but for* a single element—the absence of a prior specific warning to Gray that drinking during working hours would result in immediate discharge. (Appendix E at 41a) Notwithstanding the clear contract provision that a prior written warning was expressly waived in such case, the arbitrator held that "just cause" required a specific prior warning.[3]

On application to the District Court for the District of New Jersey to vacate the arbitrator's award, the Honorable Mitchell H. Cohen issued his opinion and order vacating the award on September 13, 1982. The court, while recognizing that "just cause" could include progressive discipline in appropriate cases, stated that the imposition of a prior written warning requirement in the instant case was contrary to the express language of the collective bargaining agreement. The court vacated the arbitration award stating that the arbitrator had exceeded his powers set forth in the collective bargaining agreement. The court found that the arbitrator engrafted onto the agreement a new provision, requiring a prior written warning, which the parties themselves had expressly waived in collective bargaining.

On appeal by the Union to the Court of Appeals for the Third Circuit, Judge Cohen's decision was reversed. The

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[3] As another clear indication of the arbitrator's lack of concern for contract provisions, in fashioning a remedy, he ordered that the Company be given credit against back pay for interim earnings, which was directly contrary to the provisions of Article XV of the agreement.

court, citing *Arco-Polymers Inc.* v. *Local 8-74,* 671 F.2d 752 (3rd Cir. 1982), cert.den. —— U.S. ——, held that the contractual "just cause" standard permitted the arbitrator to impose a prior written warning requirement, notwithstanding the specific waiver of such requirement in the agreement negotiated by the parties.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with decisions of other Circuits, and is contrary to Supreme Court precedent.

Deference to labor arbitration awards is generally favored pursuant to the "Steelworkers Trilogy."[4] However, such deference is not absolute or unqualified. While the arbitrator has broad authority in deciding a case he must exercise such authority within the limits of the agreement which the parties have negotiated, and from which he derives his power. The arbitration award herein runs afoul of this Court's admonition in *Enterprise*:

> ". . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have

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[4] *United Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

> no choice but to refuse enforcement of the award." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

A conflict exists between the Third Circuit's decision in the instant case and those of other circuits in similar cases, notably the Sixth and Tenth Circuits. Whereas these circuits have never permitted arbitrators to ignore specific provisions of a collective bargaining agreement, the Third Circuit now does so where the agreement contains a general "just cause" provision, a rather standard provision contained in virtually every collective bargaining agreement. The conflict is readily apparent, and its continuance is harmful and undermines faith in the arbitration process.

Such a distorted construction of the collective bargaining agreement in the instant case will have far-reaching national implications, spawning much unneeded controversy. The language here involved is "boiler plate" language appearing in similar form in Teamster contracts as well as many other union contracts throughout the country. For arbitration to long survive as an accepted alternate resolution technique arbitrators must be required to follow their voluntary charter contained in the contract. Egregious departures, countenanced or aided by our courts, will only serve to undermine or destroy the process and return to the courts the very controversies which the arbitration process is designed to resolve. This is an alarming prospect given the Court's concern about expanding caseloads and unnecessary cost to litigants.

Applying the standard for enforcement of arbitration awards set forth in the "Trilogy", courts have uniformly recognized that an arbitration award must be enforced if it "draws its essence" in a rational way from the collective bargaining agreement. *Ludwig Honold Manufactur-*

ing Co. v. *Fletcher,* 405 F.2d 1123 (3rd Cir. 1969); *Johnson Bronze* v. *International Union of United Auto, etc.,* 621 F.2d 81 (3rd Cir. 1980); *Arco-Polymers Inc.* v. *Local 8-74, OCAW,* 671 F.2d 752 (3rd Cir. 1982). However, where an arbitrator has exceeded his authority, courts have not hesitated to vacate his award. In *Operating Engineers* v. *Kerr-McGee Refining Corp.,* 618 F.2d 657 (10th Cir. 1980), the collective bargaining agreement provided that abuse of sick leave "will be cause for discharge." In face of that language, the arbitrator reinstated an employee who had concededly abused his sick leave, and who had been discharged for such abuse. The Tenth Circuit vacated the award, finding that the employer had negotiated abuse of sick leave as a specific cause for discharge. By ignoring this negotiated provision the arbitrator in effect rewrote the collective bargaining agreement and manifested an infidelity to his duties. Similarly, in *Mistletoe Express Service* v. *Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977), the court vacated an arbitration award where the arbitrator ordered reinstatement of an employee driver who had failed to properly account for his route collections within twenty-four hours of his shift. The collective bargaining agreement in *Mistletoe* defined "just cause" as including failure to so account within twenty-four hours. The arbitrator, in reasoning strikingly similar to that of the arbitrator in the instant case, noted that there had been no previous instances of application of the clause in question, and that progressive discipline was required. The Tenth Circuit rejected such reasoning as being beyond the authority granted the arbitrator by the parties. The court held that the arbitrator's attempt to impose a progressive disciplinary scheme constituted a rewriting of the agreement, and was grounds for vacating his award. The arbitrator in the instant case likewise tried to institute a progressive discipline requirement despite a clear contractual waiver and it should be

rejected for the same reasons. The arbitrator's reasoning herein makes even less sense, inasmuch as he completely ignored the incident and letter following the first discharge which clearly was a warning though not required by the contract.

The decision of the Third Circuit in the instant case is directly contrary to the reasoning of the Tenth Circuit in the two cited cases. Here, the collective bargaining agreement specifically provided that drinking during working hours is cause for "immediate discharge." Although this language is clear, the collective bargaining agreement further provided that no prior written warning is required for an offense of drinking during working hours. Nevertheless, the arbitrator noted that no instances of prior application of this rule were presented (there were none other than the first experience with this same grievant), and imposed a progressive disciplinary scheme upon the parties. This is precisely what the Tenth Circuit found fatal in *Mistletoe,* and which the Third Circuit excused by virtue of the "just cause" provision in this case. The conflict among the Circuits cannot be more obvious.

The Sixth Circuit has recently spoken on the instant subject in *Morgan Services, Inc.* v. *Local 323, Chicago & Central State Joint Board, ACTWU,* —— F.2d ——, reported at 115 LRRM 2368 (6th Cir. 1984) (Appendix G at 73a-89a). There, the collective bargaining agreement provided that no employee could be discharged except for "just cause." It further provided that employees could be discharged for offenses, such as insubordination, "without redress." The arbitrator issued an award finding that the grievant had been insubordinate, but he applied the "just cause" provision to require progressive discipline and reinstated the employee. The District Court, affirmed by the Sixth Circuit, vacated the award on the ground that the collective bargaining agreement was clear and unam-

biguous, and that the arbitrator had no authority to modify the discharge for insubordination. The court said:

> "Since the agreement contained an express and unambiguous reservation on the arbitrator's powers, the arbitrator could not base his award on 'customary arbitral procedures' that conflict with the agreement . . . The arbitrator errs if he looks beyond the contract and uses extraneous considerations to render the contract's clear language ineffective." 115 LRRM at 2373. (App. G at 88a-89a)

In the instant case, the collective bargaining agreement was likewise clear and unambiguous. Cause for immediate discharge, *without any prior warning,* included drinking during working hours, the offense proved before the arbitrator. The arbitrator's attempt to use the "just cause" provision to create a system of progressive discipline ignores the agreement of the parties, and constitutes the same error on which the Sixth Circuit vacated the arbitration award in *Morgan Services.*

Similarly, in *International Brotherhood of Firemen, etc.* v. *The Nestle Company,* 630 F.2d 474 (6th Cir. 1980), the collective bargaining agreement provided that insubordination "shall" constitute cause for discharge. The court vacated an arbitration award wherein the arbitrator reinstated an employee who had been admittedly insubordinate, but without back pay. In vacating that award, the Sixth Circuit noted that the language of the collective bargaining agreement was "clear and unambiguous", and that it needed no interpretation. *Id.,* at page 477. Therefore, the arbitrator had no power to ignore or modify those provisions.

The Sixth Circuit reached the same conclusion in *Amanda Bent Bolt Co.* v. *International Union, etc.,* 451

F.2d 1277 (6th Cir. 1971), where an arbitrator had ordered reinistatement of 28 employees who struck in violation of the collective bargaining agreement's no strike clause. There, the contract provided that such a strike was unprotected activity and that the strikers were subject to immediate discharge. The court held that the arbitrator had no right to qualify the employer's right to discharge admitted participants in an unlawful strike and vacated the award. Similarly, in *The Buckeye Cellulose Corp.* v. *District 65, UAW,* 689 F.2d 629 (6th Cir. 1982), the court vacated an arbitration award which had imposed a "due process" requirement upon an employer which had discharged an employee for having vandalized Company property. The parties had only authorized the arbitrator to determine whether or not the Company had just cause for discharging the employee.

Again, the Third Circuit decision in the instant case is directly contrary to the reasoning of the Sixth Circuit in the above-cited cases. Here, the arbitrator's authority was governed by a collective bargaining agreement which specifically waived any prior warning requirement. Nonetheless, he engrafted such a requirement onto the agreement by virtue of the "just cause" provision. The Third Circuit's reliance on the "just cause" provision as governing the entire collective bargaining agreement is misplaced. As the decisions in other Circuits demonstrate, " just cause" is often either defined or circumscribed by other provisions in the contract. The overall "just cause" standard of the instant collective bargaining agreement is modified by subsequent language in the same article which enumerates seven circumstances as constituting "cause for immediate dismissal."

Unlike the Sixth and Tenth Circuits, the Third Circuit has allowed the general language to modify the specific

language, rather than the converse. Furthermore, the Third Circuit's refusal to equate "cause" with "just cause" is not a rational construction of contract language. The language in *Kerr-McGee,* and in *Nestle,* mentioned "cause" for discharge. The Tenth and Sixth Circuits had no problem recognizing that "cause" meant exactly what it said, i.e. a basis for discharge. To sustain the Third Circuit decision will be to render a complete nullity all of the remaining language of the discharge provision of the collective bargaining agreement, and give the arbitrator authority to ignore the agreement as negotiated by the parties under the guise of applying a "just cause" standard. Such reasoning reflects a clear split among the Circuits, which, we submit, must be resolved in favor of the position enunciated by the Tenth and the Sixth Circuits. Their interpretation of the "just cause" standard gives meaning to the agreement as negotiated by the parties, whereas that of the Third Circuit does not.

The question presented herein has national significance and is vital to the administration of collective bargaining agreements and the arbitration process. Patently, it requires the attention of this Court.

CONCLUSION

The conflict among the circuits represented by the decision below and those of the Sixth and Tenth Circuits leaves unsettled the extent of an arbitrator's authority to interpret a just cause requirement to override specific contract provisions. Accordingly, the Court is respectfully urged to grant the petition.

Respectfully submitted,

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March 8, 1984

APPENDIX A CORRECTED COPY

Opinion and Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5592

SUPER TIRE ENGINEERING COMPANY,
a corporation of the State of New Jersey

v.

TEAMSTERS LOCAL UNION NO. 676,
Affiliated with the International
Brotherhood of Teamsters,

Appellant

On Appeal from the United States District Court
For the District of New Jersey

(D.C. Civil No. 82-1900)

Argued September 12, 1983

Before: WEIS, HIGGINBOTHAM
and SLOVITER, *Circuit Judges*

(Opinion Filed November 14, 1983)

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Appendix A

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

The district court vacated an arbitral award reinstating a discharged employee. The employee's union appeals on his behalf. We will reverse the judgment of the district court.

I.

Super Tire Engineering Company ("Super Tire"), a manufacturer, seller, and distributor of tires, fired Mitchell Gray, a spot repairer at the company's Pennsauken, New Jersey plant, for drinking alcoholic beverages during working hours. Teamsters Local 676 ("the Union"), which represents Gray under the collective bargaining agreement, grieved his discharge, and the parties submitted the unresolved dispute to arbitration before the New Jersey State Board of Mediation.

The agreement in Article 15 provides that no employee may be discharged "without just cause." In the same section, it also provides that no employee may be dismissed until the case has been discussed with the Business Agent of the Union and until there has been at least one written warning except where there is provision for "immediate dismissal." There are seven

specified causes for "immediate dismissal," including "proven drinking during working hours."[1]

The arbitrator found, and it is not contested on appeal, that Gray had been drinking alcoholic beverages at the nearby Dew Drop Inn during work breaks. He held that work breaks were "working hours" and that Gray's conduct constituted "drinking". Therefore, the conduct fell within the grounds for "immediate dismissal". He held the power to dismiss could not, however, be exercised free of review for just cause. The arbitrator

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1. The relevant portion of the contract provision is as follows:

Article 15 DISCHARGE OR SUSPENSION

Section 1 Cause for Dismissal or Suspension

No employee may be discharged or suspended without just cause. Nothing shall prohibit the Union from investigating any dismissal or suspension and resorting to the Grievance Procedure provided in this Agreement. *Until the case has been discussed with the Business Agent, no employee may be dismissed or suspended except where the provisions of this Section provide for immediate dismissal.* In the event that it is decided, as provided in the Grievance Procedure set forth in this Agreement, that the suspension or discharge was without just cause, the decision shall provide for reinstatement with or without back pay. If the decision directs reinstatement with pay, the Employer shall not receive any credits for wages or compensation earned by the employee while he was out of the Employer's employ . . . . *Except in the case of immediate dismissal for the causes set forth below, no employee may be dismissed or suspended for his first offense, but shall receive at least one written warning . . . . The parties agree that causes for dismissal without first discussing the matter with the Business Agent shall be the following:*

. . . .

(2) Drunkenness, proven drinking during working hours, or being under the influence of alcohol or unlawful narcotics during working hours.

(emphasis added).

held that the portion of Article 15 permitting immediate dismissal must be read in *pari materia* with the just cause language and reasoned that "the Company's right [to discharge an employee] is tempered, at least to the degree that such action need be exercised in a fair and even manner, rather than in an arbitrary or capricious fashion."

The arbitrator decided that absent a specific warning, the penalty of summary discharge of Gray was too severe. Super Tire had to notify its employees that it intended to enforce strictly the listed conditions of immediate discharge. "[T]here must . . . be a clearly understood and uniform application of the rule against drinking prior to its strict implementation."[2]

The arbitrator found no evidence of a prior immediate dismissal of an employee for drinking, no general warning of company policy, and no such warning to Gray. Although Super Tire had previously suspended Gray for one day after accusing him of drinking during working hours on the premises[3] and had warned him in general terms to "remember that there is to be no drinking of alcoholic beverages on company premises nor during working hours," Super Tire did not warn him of an automatic sanction of discharge.

In determining the "appropriate punishment" for Gray's violation of the contract by drinking during working hours, the arbitrator took into account Gray's

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2. The agreement requires a written warning in cases other than those for which immediate dismissal is provided, and specifies various details with regard thereto. The arbitrator did not equate the warning to which he found Gray was entitled with the contractual written warning.

3. The arbitrator noted that "[t]here is some dispute in the record as to whether the one day suspension was for drinking or for refusal to leave the premises when directed to do so."

13 years of service, the lack of clear warning, and the prior infraction. The arbitrator found there was just cause for four months' suspension without pay, but not for dismissal, and ordered Gray reinstated with back pay from four months after dismissal at full salary and benefits, less interim earnings and compensation.

Super Tire filed suit in district court seeking to vacate the award.[4] Subject matter jurisdiction was grounded on section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. On cross motions for summary judgment, the district court vacated the arbitrator's award. The court recognized the extremely limited nature of review of arbitral awards, held that under this court's recent decision in *ARCO-Polymers, Inc. v. Local 8-74*, 671 F.2d 752 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 63 (1983), the arbitrator was justified in considering whether there was just cause for the discharge, but held that the arbitrator had acted impermissibly in disregard of the contract by requiring a warning to Gray before he could be discharged. *Super Tire Engineering Co. v. Teamsters Local Union No. 676*, 546 F. Supp. 547 (D.N.J. 1982).

II.

A.

We reiterate the principles established by the Supreme Court and this court governing review of labor arbitration awards. Federal policy in favor of settling labor disputes by arbitration requires that courts

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4. The Union filed a Counterclaim seeking an injunction enforcing the award, pre-judgment interest on back pay, and attorneys' fees and costs. On appeal the Union argues that the arbitrator erred in deducting interim earnings from Gray's back pay award notwithstanding a contract provision that no such credit is to be permitted. We will not address this issue as it was not presented to the district court.

refrain from reviewing the merits of arbitration awards. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). District courts are not to review awards for legal error as if they were appellate bodies reviewing trial courts, but are limited to determining whether an award "draws its essence from the collective bargaining agreement." *See W. R. Grace & Co. v. Local Union 759*, 103 S. Ct. 2177, 2182 (1983) (quoting *Enterprise Wheel & Car Corp.*, 363 U.S. at 597). The award draws its essence from the agreement and must be upheld "if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award." *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969). *Accord Sun Petroleum Products Co. v. Oil, Chemical and Atomic Workers International Union*, 681 F.2d 924, 926-27 (3d Cir. 1982); *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299, 302 (3d Cir. 1982).[5]

B.

The arbitrator reviewed the "immediate dismissal" and "just cause" clauses of the collective bargaining agreement and determined that all dismissals were subject to arbitral review for just cause. There is no language in the contract which forecloses this

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5. Fraud, partiality, misconduct, violation of specific command of law, or vagueness rendering enforcement impracticable are also grounds on which an arbitral award may be contested. *Ludwig Honold Mfg. Co.*, 405 F.2d at 1128 n.27. None of these claims is presented in this case.

inference. The contract states in simple terms, "No employee may be discharged or suspended without just cause."

Although it also provides that an employee who drinks during working hours "*may be* dismissed or suspended for his first offense" (emphasis added), no provision of the contract precludes review of such dismissals for just cause. Further, although such drinking is characterized as cause for "immediate dismissal," the contract does not equate the enumerated causes for "immediate dismissal" with "just cause" for dismissal. In contrast, in *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692, 694 (10th Cir. 1977), relied on by Super Tire, the dismissal provision specifically listed the offense as a just cause for which employees may be discharged.

Our recent decision in *ARCO-Polymers* is directly on point. The discharged employee had been absent for 19 days without good and sufficient cause. The agreement provided, "Employees absent from work without good and sufficient cause for more than four (4) consecutive days shall be subject to discharge." However, in another article, it also provided, "Employees shall be discharged only for just cause." 671 F.2d at 752-53. The arbitrator's award reinstated the employee, but the district court vacated that award on the theory that the employer had acted pursuant to an express contractual right. In holding that the district court erred, we relied on the presence of the "just cause" provision. In light of that clause, we reasoned that "[i]t cannot be said with absolute certainty . . . that discharge under this section is 'strictly a function of management.'" 671 F.2d at 756 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960)). We stated:

> Thus, the arbitrator might have found that all discharges are subject to the "just cause" provision

> . . . and that consequently the contract authorized him to apply all the surrounding facts and circumstances to his interpretation of the contract to determine whether or not discharge is proper.

ARCO-Polymers, 671 F.2d at 756. Because the contract did not foreclose this inference and did not "unequivocally reserve[ ] to the employer the right to discharge employees for the specific conduct set forth," *id.* at 757 n.4, the award was not irrational and was to be enforced by the district court. *Id.* at 758. See *Kewanee Machinery Division v. Local 21, International Brotherhood of Teamsters*, 593 F.2d 314, 317-18 (8th Cir. 1979); *Timken Co. v. United Steelworkers*, 492 F.2d 1178, 1180 (6th Cir. 1974).

The award in the present case is similar to that upheld in *ARCO-Polymers*. Because the arbitrator held the specific dismissal provision subject to an overall just cause provision, he then was free to determine whether there was just cause for dismissal, applying his expertise and the law of the shop. As in *ARCO-Polymers*, "We cannot say that the arbitrator's award does not draw its essence from the contract." 671 F.2d at 756-57. In the absence of an unambiguous provision in the agreement mandating dismissal or removing an arbitrator's review function, we will not set aside an arbitrator's decision to review a dismissal in light of the mix of factors that make up just cause.

C.

The district court recognized that under our decision in *ARCO-Polymers*, "[the arbitrator's] decision that the 'just cause' requirement controls even specific provisions regarding discharge is not open to question." 546 F. Supp. at 551. Nonetheless, the district court

concluded that the award should be vacated because the arbitrator's determination "nullifie[d]" the provision of the contract which "expressly grants the Company the power to dispense with the warning when discharging the employee for the enumerated offenses." *Id.* However, once it is conceded that the arbitrator had the power to make a just cause determination, the district court is not free to review the merits of that determination.

The terms of the contract are not so clear as to foreclose the arbitrator's view of just cause as including, among other factors, the absence of an unambiguous warning of a policy of strict enforcement. The contract does not unequivocally preclude notice to *employees* of an intent to enforce the dismissal conditions strictly even though notice to *the Union's Business Agent* may be dispensed with in the enumerated situations. Under the arbitrator's interpretation, an employee "may be" dismissed for a first offense of drinking during working hours, as provided under the terms of the dismissal clause, but only after fair notice of the employer's policy. *See supra* note 2. The arbitrator also noted that Super Tire had, by its action against Gray, given notice to employees that the company would henceforth enforce a strict policy of dismissal for drinking during working hours which include break periods away from company premises. The warning and dismissal provision has not been nullified, but merely interpreted in light of industrial practice and principles of just cause. The district court is not free to reject that interpretation.

The Supreme Court recently reiterated the cardinal principle that "a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one." *W.R. Grace & Co.*, 103 S. Ct. at 2182 (1983). The parties bargained for the arbitrator's construction of the contract and should be bound by it.

Id. at 2182; *Enterprise Wheel*, 363 U.S. at 599; *Ludwig*, 405 F.2d at 1125.[6]

III.

The order of the district court will be reversed and the case remanded with a direction that the district court enter judgment for the appellant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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6. Enforcement of the award does not violate public policy as Super Tire suggests. Public policy may be a ground for overturning awards "only if upholding an award would amount to 'judicial condonation' of illegal acts" and thus would "conflict[] directly with federal or state law." Kane Gas Light & Heating Co. v. International Brotherhood of Firemen and Oilers, Local 112, 687 F.2d 673, 681-82 (3d Cir. 1982), *cert denied*, 103 S. Ct. 1251 (1983). The public policy must be "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents.'" *W.R. Grace & Co.*, 103 S. Ct. at 2183 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)). Gray's reinstatement conflicts with no law or well-defined policy of which we are aware. *Cf.* Amalgamated Meat Cutters, Local Union 540 v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983) (violation of public policy to reinstate truck driver whose intoxication caused a wreck). There was no evidence that Gray poses a threat to fellow workers or society.

APPENDIX B

Denial of Petition for Rehearing and Rehearing In Banc by the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-5592

SUPER TIRE ENGINEERING COMPANY, etc.

v.

TEAMSTERS LOCAL UNION NO. 676, etc.,

Appellant

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge,* Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker, *Circuit Judges*

The petition for rehearing filed by Appellee, Super Tire Engineering Company, etc., in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

DOLORES K. SLOVITER
Circuit Judge

Dated: Dec 12 1983

APPENDIX C

Decision of the United States District Court for the District of New Jersey

(Filed: September 13, 1982)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 82-1900

SUPER TIRE ENGINEERING COMPANY, a corporation of the State of New Jersey,

Plaintiff,

v.

TEAMSTERS LOCAL UNION NO. 676, Affiliated with the International Brotherhood of Teamsters,

Defendant.

Appearances:

Apruzzese & McDermott, P.A.
By: Vincent J. Apruzzese, Esquire
Springfield, New Jersey 07081
Attorneys for Plaintiff

Appendix C

Tomar, Parks, Seliger, Simonoff
& Adourian, P.A.
By: Barry M. Bennett, Esquire
Haddonfield, New Jersey 08033
Attorneys for Defendant

Cohen, Senior Judge:

This action to vacate an arbitration award is presently before the Court on plaintiff's motion for summary judgment and defendant's cross motion for summary judgment to enforce the award. Jurisdiction is vested pursuant to § 301 of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 (1973), § 185 (1978).

Plaintiff (Company) operates a tire manufacturing plant in Pennsaukin, New Jersey. Both plaintiff and defendant (Union) are parties to a collective bargaining agreement which contains a grievance procedure providing for arbitration of disputes regarding interpretation of the agreement.[1] The grievance at issue involves the discharge by the Company of one of its employees, Mitchell Gray.

On August 31, 1981, Gray was observed drinking beer on the plant premises by the maintenance director and refused to obey his direction to leave the grounds. The Company discharged Gray on August 31, 1981 and so notified him, on that date, by means of the following correspondence:

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[1] The contract, in Article 6, Section 1, provides that "all grievances or disputes arising under the terms of this Agreement shall be handled in the manner provided [in the grievance provisions.]"

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> This is to inform you that you are being terminated from our employ effective Friday, September 4, 1981.
>
> *The cause of the termination is for drinking alcoholic beverages on Company premises and for drinking during working hours.* (Emphasis added).

After discussing the matter with the Union's Business Agent, the Company voluntarily modified its original decision to terminate Gray. At oral argument, it was indicated that the Company's decision was prompted by the prospect of pursuing the case through the grievance procedure. On September 4, 1981, Gray was sent the following notice:

> This is to inform you that the letter dated August 31, 1981 is being rescinded and you are being suspended from work for one day in lieu of termination. . . .
>
> *Please remember that there is to be no drinking of alcoholic beverages on Company premises nor during working hours.* (Emphasis added).

After Gray returned to work, it was reported that he continued to drink alcoholic beverages during his break periods. This information caused the Company to hire a detective agency to keep Gary under surveillance. Two investigators reported that they observed Gray drinking alcoholic beverages on several occasions during September and October 1981 at the nearby Dew Drop Inn and in cars parked around the Inn. On October 31, 1981, Gray was again discharged for consuming alcohol during working hours. The termination was taken to arbitration and heard

by arbitrator, Thomas F. Carey, who issued his decision on April 20, 1982.

Initially, the arbitrator made the finding that Gray was drinking alcoholic beverages during his break periods. (Award p. 11). From an examination of the contract, he determined that " 'break periods' fall within the time prescribed as 'working hours'." (Award p. 12). Consequently, the arbitrator concluded that Gray was guilty of drinking alcoholic beverages during working hours. (Award p. 11).

Arbitrator Carey then confronted the question of whether Gray was properly discharged under Article 15, Secion 1[2] of the collective bargaining agreement. He found that the Company was justified in taking some disciplinary action against Gray but that discharge was "too severe absent proper notice to [sic] the no drinking rule." (Award p. 11). The arbitrator deemed a four month disciplinary suspension without pay to be an appropriate penalty. (Award p. 17).

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[2] No employee may be discharged or suspended without just cause. . . . Until the case has been discussed with the Business Agent, no employee may be dismissed or suspended except where the provisions of the Section provide for immediate dismissal. . . . *Except in the case of immediate dismissal for the causes set forth below, no employee may be dismissed or suspended for his first offense but shall receive at least one written warning.* . . . The parties agree that causes for dismissal without first discussing the matter with the Business Agent shall be the following:

. . .

(2) *Drunkenness, proven drinking during working hours, or being under the influence of alcohol . . . during working hours.*

. . .

(Emphasis added).

Appendix C

The arbitrator reached his decision that discharge was inappropriate in this case by an analysis of the "just cause" language of the aforesaid Article 15, Section 1. According to the arbitrator, this provision requires that the Company's action under Article 15 be exercised in a fair and even manner, rather than in an arbitrary and capricious fashion. (Award p. 13). He concluded that the Company's intent to strictly apply the no drinking rule required that the employee be given advance notice; inasmuch as there was no evidence presented that any other employee had previously been discharged for drinking alchoholic beverages, and express warning should have been given to Gray before he was discharged. (Award pp. 13-14). The arbitrator held that the notice given to Gray on his prior discharge and reinstatement was insufficient because it failed to *specifically* inform him that his continued alcohol consumption on Company time would result in his discharge. (Award p. 14).

In arriving at this decision, Arbitrator Carey also took into consideration Gray's thirteen year work record which listed the August 31, 1981 warning as his only violation of the Company's rules.[3] "To dismiss an employee of many years for a second offense, without proper warning of potential discharge, normally presumes a degree of consistency by the Company in handling similar infractions involving the work force." (Award pp. 15-16). Since no uniform rule had been formulated regarding application of the no drinking provision and since Gray had not been told

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[3] The Court recognizes that a dispute exists regarding Gray's work record, but for purposes of this opinion we will assume, as did the arbitrator, that Gray had committed no other infractions against the Company during his thirteen years of service.

categorically that he would be fired for a second offense, "just cause" for discharge did not exist. (Award p. 16).

In this case, the Company's position is essentially that the arbitrator's award should be vacated because it is not supported under any interpretation of the contract. The Company reasons that, since the agreement expressly provides that an employee may be immediately discharged without warning for drinking on the job, the arbitrator's interpretation of the "just cause" provision to require a warning before discharge is contrary to the contract language. Alternatively, even if a warning is required, the letter of August 31, 1981, which rescinded Gray's discharge and cautioned him about his continued drinking on the job, constituted sufficient notice under any rational construction of the contract.[4]

It is well established that the scope of the Court's review of an arbitration decision is extremely limited and that an award is considered legitimate if it "draws its essence from the contract." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960).

> [A] labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its lan-

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[4] The Company also contends that the arbitrator exceeded his authority in changing Gray's termination to a suspension, (*see*, Article 15, Section 1), and in giving the employer credit for compensation earned by the employee in outside employment while he was suspended. (*Id.*) The Court considers these assertions as further allegations of the arbitrator's disregard of the collective bargaining agreement. In light of our ultimate decision in this case, we find it unnecessary to decide these issues.

> guage, its context, and, other indicia of the parties' intention; only where there is manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.

Johnson Bronze v. *Intern. U. of United Auto, Etc.*, 621 F. 2d 81, 82 (3d Cir. 1980) (quoting *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969)).

Generally, an arbitrator is given wide latitude in construing a collective bargaining agreement. It is irrelevant whether the Court agrees with the arbitrator's application and interpretation of the agreement. *NF&M Corp.* v. *United Steelworkers of America*, 524 F.2d 756, 760 (3d Cir. 1975). The fact that an arbitrator misconstrued the contract does not open the award to judicial review. *Ludwig*, 405 F.2d at 1128. However, an arbitrator's decision cannot be upheld if his construction of the contract manifests a disregard of its express provisions. *Mistletoe Exp. Serv.* v. *Motor Expressmen's U.*, 566 F.2d 692, 695 (10th Cir. 1977); *Amanda Bent Belt Co.* v. *International U., U.A., A.I.W.*, 451 F.2d 1277, 1280 (6th Cir. 1971); *Truck Drivers & Helpers Union 784* v. *Ulry-Talbot Co.*, 330 F.2d 562, 566 (8th Cir. 1964).

In this case, the arbitrator read the "just cause" provision to govern all discharges under the contract. His decision that the "just cause" requirement controls even specific provisions regarding discharge is not open to question by this Court. *Arco-Polymers, Inc.* v. *Local 8-74*, 671 F.2d 752, 756 (3d Cir. 1982). Therefore, after he determined that the Company had complied with the specific contract provisions, the arbitrator was empowered to determine whether or not there existed "just cause" for discharge.

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An arbitrator's finding that the "just cause" provision controls, authorizes him to apply all the surrounding facts and circumstances to determine whether or not a discharge is warranted. *Id.* Additional, "[*i*]*n a proper case,* an arbitrator . . . may construe a 'just cause' provision of a labor contract to include a progressive discipline requirement and may determine that certain conduct is 'just cause' for discipline but not for discharge." *Id.* (quoting *Mistletoe, supra* 566 F.2d at 695) (emphasis added). However, the progressive discipline mandated by the arbitrator here, i.e., a prior written warning, is directly contrary to the contract language and cannot be sustained. *Mistletoe,* 566 F.2d at 695.

As previously noted, Article 15, Section 1 of the agreement provides that "[e]xcept in the case of immediate dismissal for the causes set forth below[5], no employee may

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[5] The causes include the following:

(1) Calling or participating in any unauthorized strike, work stoppage, or walk-out.

(2) *Drunkenness, proven drinking during working hours, or being under the influence of alcohol or unlawful narcotics during working hours.*

(3) Theft or dishonesty.

(4) Assault on his Employer or his Employer's representative during working hours.

(5) Carrying unauthorized passengers in Employer's vehicle.

(6) Assault by an employee against his fellow workers during working hours.

(7) Deliberate vandalism or defacing Company property and equipment, or, in this case, in lieu of discharge, financial action may be taken against the employee.

(Emphasis added).

be dismissed or suspended for his first offense but shall receive at least one written warning."[6] This provision recognizes the need for warning employees of potential disciplinary action in most instances but expressly grants the Company the power to dispense with the warning when discharging an employee for the enumerated offenses. It seems likely that the Company bargained for the immediate discharge provision because it considered such a clause necessary for the protection of the Company's employees and its premises.

The arbitrator's determination that a warning may be required in the instant case, nullifies this provision and, in effect, rewrites the agreement of the parties. *See, Mistletoe, supra* 566 F.2d at 695. In practical terms, Arbitrator Carey's decision means that the employer would be unable to discharge an intoxicated employee for his first offense but would instead be compelled to first warn the employee and then terminate his employment only after he was found to be intoxicated a second time. In the interim, the remainder of the work force would be exposed to the risk of injury caused by a drunken employee operating heavy equipment. Such a result certainly would not give effect to the "parties' intention" and cannot be sustained.[7] *Ludwig, supra* 405 F.2d at 1128.

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[6] Although an arbitrator is not required to state his reasons for rendering a decision, *see, Virgin Islands Nursing Association's Bargaining Unit* v. *Schneider*, 668 F.2d 221, 222 (3d Cir. 1981), we note that this provision is never specifically addressed in Arbitrator Carey's otherwise detailed opinion.

[7] Although the Court agrees with the Company's contention that the warning given to Gray was sufficient under any reading of the

(Footnote continued on following page)

Appendix C

In arriving at our decision, this Court is mindful that in *Arco-Polymers, supra,* the Third Circuit Court of Appeals reached a different result when faced with a somewhat similar but distinguishable factual situation. The collective bargaining agreement in that suit provided, in pertinent part: "Employees absent from work without good and sufficient cause for more than four (4) consecutive days shall be subject to discharge. . . . Employees shall be discharged only for just cause." 671 F.2d at 752-753. The court of appeals upheld an arbitrators' decision which reinstated an employee who had been absent from work for nineteen (19) days without justification. 671 F.2d at 758.

Since the arbitrator's opinion in *Arco-Polymers* was unclear, the court of appeals discussed the possible bases of his decision. Initially, the court decided that the provision which allowed the Company to discharge an employee for unauthorized absences could have been construed as non-mandatory and one which does not necessarily give management complete discretion regarding discharges. *Id.* In light of these findings, the court held that the arbitrator may have determined that all discharges were subject to the "just cause" provision. *Id.* Consequently, the arbitrator was permitted to apply the surrounding facts and read into the contract a progressive discipline requirement in deciding if "just cause" existed. *Id.*

(Footnote continued from preceding page)

contract, this constitutes a factual determination of the arbitrator which is not open to judicial review. *Ludwig, supra,* 405 F.2d at 1128; *Parsons* v. *Blue Ridge-Winkler Textiles,* 517 F.Supp. 422, 425 (E.D. Pa. 1981). Consequently, our opinion does not review the arbitrator's decision on this issue.

The present case, however, is distinguishable from *Arco-Polymers* in several crucial respects. Imposition of a progressive discipline procedure in *Arco-Polymers* did not require an employer to perform an act, i.e. issue the employee a written warning before discharge, from which he was specifically exempted under the contract. That is exactly the duty imposed on the employer in the instant situation. Additionally, there was no indication in *Arco-Polymers* that the parties had agreed to use progressive discipline in some instances and not in others. In this case, the contract manifests just such an agreement. Finally, and perhaps most importantly, the court's decision in *Arco-Polymers* did not result in the elimination of a specific contract provision. In our opinion, the immediate discharge clause in this case will be rendered meaningless if the arbitrator's decision is upheld.

The Court can only assume that this provision was included in the agreement as a result of collective bargaining between the parties. Given the size of the Company and the sophistication of the Union, it is likely that both parties were represented by experienced negotiators who engaged in the bargaining contemplated by the National Labor Relations Act in order to gain the provisions favorable to them. It would certainly subvert the purpose of the Act and frustrate the intention of the parties to allow an arbitrator to alter the contract provisions to which the parties had previosuly agreed.

Although the court in *Arco-Polymers* recognized use of the "just cause" provision to impose a progressive discipline requirement in the particular factual situation presented there, it did not sanction such an interpretation in every instance. In light of the aforementioned distinctions, this Court is of the opinion that application of the

Arco-Polymers rationale is unwarranted in the case at bar.[8]

For the foregoing reasons, we hold that the arbitrator's award does not draw its essence from the collective bargaining agreement and must be vacated. Plaintiff's motion for summary judgment shall be granted and defendant's cross motion for summary judgment shall be denied.

The Court shall prepare an appropriate order.

MITCHEL H. COHEN
Senior Judge
United States District Court

---

[8] It should be noted that we do not hold that the arbitrator was not empowered to consider the surrounding facts and circumstances when determining whether Gray was discharged for "just cause"; only that he was not authorized to impose on the employer a warning requirement, in light of the contract provision to the contrary.

APPENDIX D

Judgment of the United States District Court for the District of New Jersey

(Filed: September 13, 1982)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 82-1900

SUPER TIRE ENGINEERING COMPANY, a corporation of the State of New Jersey,

Plaintiff,

v.

TEAMSTERS LOCAL UNION NO. 676, Affiliated with the International Brotherhood of Teamsters,

Defendant.

This action to vacate an arbitration award is presently before the Court on plaintiff's motion for summary judgment and defendant's cross motion for summary judgment to enforce the award;

For the reasons set forth in the Court's opinion rendered this day;

Appendix D

It is on this 13th day of September 1982 ordered that plaintiff's motion for summary judgment is hereby granted and defendant's cross motion for summary judgment is hereby denied.

MITCHELL H. COHEN
Senior Judge
United States District Court

APPENDIX E

Arbitration Award

STATE OF NEW JERSEY
STATE BOARD OF MEDIATION

IN THE MATTER OF ARBITRATION
TEAMSTERS LOCAL UNION NO. 676
and
SUPER TIRE ENGINEERING COMPANY

CASE NUMBER: 81-453

OPINION AND AWARD

HEARING HELD
February 22, 1982

BRIEFS FILED
March 29, 1982
April 2, 1982

Thomas F. Carey, Arbitrator

Appendix E

Appearances:

Union

Barry Bennett, Esquire	Attorney
John Bogan	Attorney Law Clerk
Anthony Palombi	Business Agent
Fortunato Martino	Committee C.M.
Mitchell J. Gray	Employee

Company

Harold Finkle, Esquire	House Counsel
Stanley Krein	Vice President
Kitty Robinson	Acu-men Detective Agency
Darrell W. Jenkins	Acu-men Detective Agency
William Harris	Acu-men Detective Agency

BACKGROUND

This proceeding arose as the result of a claim by the Teamsters Local Union No. 676 (the Union) that the Union had certain contractual rights, pertaining to the discharge of an employee, violated under the 1980 Agreement between the Union and the Super Tire Engineering Company (the Company). The dispute being unresolved was submitted by the Association to arbitration and the undersigned was selected as Arbitrator in accordance with the procedures of the New Jersey State Mediation Board. After due notice a hearing was held before the Arbitrator in Cherry Hill, New Jersey, on February 22, 1982 at which

time the Parties were afforded full opportunity to present oral and written evidence, cross-examine witnesses, provide oral argument and otherwise support their respective positions. Both Parties stipulated before the hearing began that the grievance procedures as set forth in the Agreement were substantially in compliance. By mutual agreement the hearing was not transcribed and the record consists of two (2) Joint, one (1) Union, and three (3) Company exhibits. The evidence so submitted and the positions and arguments set forth at the hearing have been fully considered in preparation and issuance of this Opinion and its accompanying Award.

THE ISSUES

Was the employee, Mitchell Gray, discharged for just cause, i.e., drinking during working hours? Is the discharge justified?

REMEDY SOUGHT

If not, what shall the remedy be?

THE MERITS OF THE GRIEVANCE

Contractual Provisions (relied upon by either or both Parties)

ARTICLE 6 GRIEVANCES

Section 1 Grievance Machinery

First Step. In the case of any such grievance or dispute, the Departmental Shop Steward or Com-

mitteeman shall take the matter up with the Employer or the Employer's representative within ten (10) working days after such grievance or dispute becomes known and every effort shall be made to reach a mutually satisfactory solution. The Departmental Shop Steward or Committeeman where the grievance had arisen, shall take the matter up with the Employer or Employer's representative. The Departmental Shop Steward or Committeeman may, if necessary, request the aggrieved to be present when discussing such matter with the Employer. When a grievance has arisen and is presented to the Employer in the first step of the grievance procedure, the Employer shall within five (5) working days, give his answer to the grievance, in writing. *Fourth Step.* Should the President of the Union and the Personnel Director fail to come to any mutual agreement on such grievance or dispute, such grievance or dispute shall be submitted to a disinterested arbritrator, who is mutually agreed upon between the Employer and the Union. In the event the Employer and the Union cannot agree on a disinterested arbitrator then the matter shall be submitted to the New Jersey State Mediation Service for selection of arbitrators; and such selection shall be by mutual agreement by the Employer and the Union.

The arbitrator shall within thirty (30) days of the closing of such hearing render a decision or decisions in such matter or matters which decision or decisions shall be final and binding on the parties. The cost of the arbitrator shall be borne equally between the parties.

Appendix E

ARTICLE 15 DISCHARGE OR SUSPENSION

Section 1 Cause for Dismissal or Suspension

No employee may be discharged or suspended without just cause. Nothing shall prohibit the Union from investigating any dismissal or suspension and resorting to the Grievance Procedure provided in this Agreement.

Until the case has been discussed with the Business Agent, no employee may be dismissed or suspended except where the provisions of this Section provide for immediate dismissal. In the event that it is decided, as provided in the Grievance Procedure set forth in this Agreement, that the suspension or discharge was without just cause, the decision shall provide for reinstatement with or without back pay. If the decision directs reinstatement with pay, the Employer shall not receive any credits for wages or compensation earned by the employee while he was out of the Employer's employ. Except where an emergency prevents it, grievances concerning dismissal or suspension shall be advanced over all other matters pending for grievance hearings, and shall be promptly heard. Except in the case of immediate dismissal for the causes set forth below, no employee may be dismissed or suspended for his first offense, but shall receive at least one written warning. Warning notices for absence or lateness must be given within five (5) work days; warning notice for all other violations must be given within three (3) work days following day of violation. The parties agree that causes for dismissal without first discussing the matter with the Business Agent shall be the following:

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(1) Calling or participating in any unauthorized strike, work stoppage, or walk-out.

(2) Drunkenness, proven drinking during working hours, or being under the influence of alcohol or unlawful narcotics during working hours.

(3) Theft or dishonesty.

(4) Assault on his Employer or his Employer's representative during working hours.

(5) Carrying unauthorized passengers in Employer's vehicle.

(6) Assault by an employee against his fellow workers during working hours.

(7) Deliberate vandalism or defacing Company property and equipment, or, in this case, in lieu of discharge, financial action may be taken against the employee.

In each instance, the Employer shall promptly notify the Union of the action taken, in writing, promptly upon such action.

The parties agree that a dismissal or suspension shall not be subject to the Grievance Procedure or arbitration as provided in this Agreement unless the Union shall have notified the Employer in writing of the intention to do so within two (2) weeks of dismissal or suspension. The parties recognize that in interpreting previous agreements there have been difficulties over whether or not the Employer may dismiss employees for slow-downs. The parties agree that this matter is cause for discharge.

Appendix E

POSITION OF THE UNION

The Union asserts the uncorroborated testimony of two relatively young and inexperienced investigators is not sufficient to justify a discharge of the Grievant. The Union points out the investigators' testimony showed an uncertainty as to vital details. The Union further reports the observations claimed by the investigators indicate "a number of inferences unsupported by the facts." The Union insists investigator J. on two occasions only saw the Grievant drinking something unidentified. The Union further claims the testimony of this investigator that the Grievant told him he had drunk alcohol was refuted by the Grievant.

The Union proffers the other investigator, Mr. H. testified he saw the Grievant drink a beer on one occasion, but "was never sufficiently close to the beverage or the bottle to determine if alcohol was actually involved." The Union tenders that in regard to another observation of this investigator, he only alleges he heard the Grievant ask for Scotch, but did not examine the glass. Conversely, the Union tenders the Grievant testified he only visited the inn to purchase food, soft drinks, and use the telephone. The Union asserts the Grievant denies ever ordering drinks at the inn during working hours.

The Union explains there was never any physical evidence introduced by the Company against the Grievant. The Union claims there was never any pictures, tapes, or breathalyzer tests introduced against the Grievant, nor reports of impairment in job performance or testimony of alcohol on the breath of the Grievant.

The Union holds the inexperience of the investigators, along with inferences which were not warranted, are not

sufficient to result in the discharge of the Grievant. The Union urges that there was "a total lack of corroboration" of the inferences made by the investigators.

The Union avers even if there is a determination that the Grievant was drinking, the penalty of discharge is too severe. The Union informs there is no requirement in the contract that an employee must be dismissed for drinking during working hours, but only that such drinking is a cause for dismissal. The Union contends there was not an even level of prohibition against drinking. The Union points out that one (1) day suspension of the Grievant only occurred because the Grievant refused to leave the premises while drinking. The Union presses the lack of a clear policy regarding drinking renders the penalty of discharge too severe.

It is noted by the Union that the Grievant has thirteen (13) years service. The Union makes known there was testimony by the Company representative that "at no time was he aware of any failure by the Grievant to perform his job and raised only the one-day suspension in terms of prior discipline."

The Union acknowledges there was testimony about alcohol on the breath of the Grievant, but such testimony on "second hand reports" of other individuals, not the investigators.

The Union asserts that although this hearing was not directed toward the competence of the investigators, a consideration of "their capabilities must be considered." The Union proposes such consideration shows the investigators are limited in experience, and did not take sufficient care with detail.

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It is contended by the Union that the "just cause requirement controls everything else in Article XV." The Union argues the contract does not state "that discharge is the madatory," and the only penalty for violation of the seven (7) specified classes of midconduct. The Union professes "due process requires consideration of all aspects of the employee's record" in determining whether there is just cause present to warrant discharge.

POSITION OF THE COMPANY

The Company explains the Grievant was discharged from the employment of the Company because of a contract violation. The Company contends that the Parties to the Collective Bargaining Agreement had agreed that a cause for dismissal without any discusion with the Business Agent is "proven drinking during working hours." The Company puts forth the violation of the contract occurred during the weeks from September 28, 1981 to October 19, 1981. The Company submits the drinking occurred at an inn during break period.

The Company sets forth that Article 20, Section 2 of the contract calls for two break periods of ten (10) minutes, each are to be "without loss of pay." The Company further affirms the work week is set at eight (8) hours a day, excluding meal period. The Company professes that "under this Contract the 'break period' is an integral part of the employee's 'working hours.'" The Company recounts that since break periods are included in working time, then according to the contract an employee may be dismissed peremptorily for proven drinking during the break period.

Appendix E

The Company contends it has sustained its burden of proof by all legal standards of evidence. The Company makes clear that the testimony of the investigators was clear and unimpeached. The Company confirms that the testimony of its other witnesses at the hearing was also clear and unimpaired and the Company has "carried its burden of proof."

It is proposed by the Company that the entire testimony of the Grievant was basically an unsupported general denial of the drinking of alcoholic beverages. The Company recounts the Grievant concedes he consumed alcoholic beverages at the inn mentioned in the testimony of the investigators at times other than break periods. The Company argues that the Grievant's testimony that he did not consume alcoholic beverages during break periods is "a self-serving statement and too far fetched to be believed."

The Company contends that despite being given ample time to produce corroborative testimony to support the Grievant in his defense, he was unable to produce any such witness from the inn. The Company submits the "conclusion is that the Grievant has no truth to defend." The Company claims the Grievant also denied any guilt in his earlier suspension for drinking. The Company maintains the Grievant "has a mind-set which cannot comprehend his own guilt."

The Company makes known the Union has produced no substantive rebuttal evidence and the Company's proof is unimpaired.

The Company maintains there was testimony by Mr. Krein that there was the smell of alcohol on the breath of the Grievant in contradiction of the Union's contention that there was no such testimony.

Appendix E

The Company avers the contract "in very precise language, does provide for 'capital punishment' in the violation of any of the seven specific 'cardinal sins.'" The Company proffers there are no "extenuating considerations" mentioned in the contract. The Company asserts if any employee commits one of the seven specified classes of misconduct, then "the penalty of dismissal is prescribed by contract."

The Company explains the investigators only testified as to what they saw and heard and their investigative skills were not the question of this hearing. The Company explains that intoxication or alcoholism are not charged against the Grievant, nor was the Grievant's entire disciplinary record relevant at this hearing.

DISCUSSION AND OPINION OF THE ARBITRATOR

This case requires a determination as to whether the Company was justified in discharging the Grievant. One investigator (J.) employed by the Company, testified that on two (2) occassions the Grievant was seen leaving a public bar and drinking a beverage in an automobile. This investigator (J.) testified he later looked in the car and saw two bottles of beer. The same investigator (J.) further testified the Grievant told him that he had taken a shot of whiskey at 9:00 a.m. at the bar. The investigator (J.) testified he saw the Grievant drink a beer during a break period at this same bar on one other occasion.

The second investigator (H.) testified that on two (2) other days he observed the Grievant drinking beer in the bar. This investigator (H.) also testified that on still one (1) other occasion, during a break period, he saw the

Grievant enter the bar, heard him order two (2) shots of Scotch and drink them.

Conversely, we have the testimony of the Grievant who insists that he never drinks alcoholic beverages at this bar or elsewhere during his break period. The Grievant acknowledges he does visit the bar during his break period, but only to order soft drinks, food, or use the telephone. The Grievant testified he does visit this bar at other times and consumes alcoholic beverages, but again, never during break periods.

The Union position is that the investigators drew inferences that the Grievant was drinking alcoholic beverages without obtaining any proof that this was true. The Union argument is that the observation of the alleged drinking in the car was done at so great a distance so as not to permit the absolute conclusion that an alcoholic beverage was being consumed.

In a further attempt to show the investigators were inattentive to detail, the Union notes that although one investigator testified he heard the Grievant order Scotch, he never examined the glass or the liquid to determine that it was alcohol. Similarly, the Union claims the testimony of investigator (H.) that he saw the Grievant drink a beer in the bar should not be accepted because the investigator was not close enough to examine the beverage or the bottle to be certain that alcohol was involved.

An objective review of the testimony of all the witnesses, however, results in the reasonable conclusion that the Grievant was indeed drinking alcoholic beverages during his break period. Despite the fact that some of the testimony and evidence was circumstantial, the testimony of the investigators that they heard the Grievant order alcoholic

beverages and saw him drink alcoholic beverages in the public bar stands basically uncontroverted. The Grievant's denial that he drank alcohol during break periods was not corroborated by any other witness. Even when given additional time and opportunity to produce witnesses from the Dew Drop Inn confirming the Grievant's denial of drinking during break periods, the Grievant was not able to do so. All we have is the Grievant's unconfirmed testimony that he did not drink during break periods. This testimony by the Grievant is found not to be persuasive.

Having determined that there was ample testimony to support the conclusion that the Grievant was drinking alcoholic beverages during break periods, we must examine the application of the contract language to the fact pattern of the instant case. Article 15, Section 1, cause for Dismissal or Suspension, reads in part as follows:

> The parties agree that causes for dismissal without first discussing the matter with the Business Agent shall be the following: . . .
>
> (2) Drunkenness, proven drinking during working hours, or being under the influence of alcohol or unlawful narcotics during working hours . . .

Article 20, Section 2 calls for one break period in the morning and one in the afternoon "without loss of pay." Article 24, Section 1, defines the work week as being five days of eight hours each, but not including the lunch period. From an examination of the language of the contract, it is clear that "break periods" fall within the time prescribed as "working hours." The Union does not challenge that during a "break period" the employee is

considered to be on "paid for time." Thus it must follow that the Grievant, by drinking during a break period, was contractually doing so during the working time period.

The contract language selected by the Parties is clear, that the Company is empowered for certain specified causes to dismiss the Grievant from its employ "without first discussing the matter with the Business Agent." However, an examination of how the contract language has been applied in the past is also required. In regard to the Grievent, the record indicates a prior instance involving his drinking resulting in a one (1) day suspension. There is some dispute in the record as to whether the one day suspension was for drinking or for refusal to leave the premises when directed to do so. No evidence was introduced by the Company to demonstrate they had applied the language of the contract in dismissing any other employee for drinking within working time.

The Collective Bargaining Agreement, while specifying certain offenses under Article 15, which can be subject as employee to discharge without first notifying the Union, also contains a "just cause" provision. These two Sections of Article 15 should be read in *pari-materia.* The Company's right to act under Article 15 is tempered, at least to the degree that such action need be exercised in a fair and even manner, rather than in an arbitrary or capricious fashion. Further, its intent to adhere to a strict application of conditions and requirements of Articler 15 requires some form of advance notice.

Given the fact that the record is silent on any prior application by the Company of its rights under the Article to actually discharge an employee, the Company is under some obligation to announce its intent of strict compli-

ance. Such a determination and prior warning could have been made in reference to the Grievant's prior offense.

In that instance the Company first notified the Grievant on August 31, 1981 that:

> This is to inform you that you are being terminated from our employ effective Friday, September 4, 1981.
>
> The cause of this termination is for drinking alcoholic beverages on company premises and for drinking during working hours.

It subsequently, on September 4, 1981, modified its original decision of termination, and informed the Grievant that:

> This is to inform you that our letter dated August 31, 1981 is being rescinded, and you are being suspended from work for one day in lieu of termination. The date of your suspension will be Thursday, September 10, 1981.
>
> Please remember that there is to be no drinking of alcoholic beverages on company premises nor during working hours.

It is clear that Grievant was warned about the prohibition against drinking on Company premises or during working hours. However, the penalty that would result from any subsequent infraction, namely, discharge was not cited in that warning. This lack of specificity in its warning is critical, given the fact that there had been no other prior application to any other employee of its strict adherence policy to this particular prohibition concerning

drinking. Nor was such intent to strictly comply ever previously made known to the work force in general.

The degree to which the Company has exercised the provisions of Article 15, Section 1, sub-Section 2, regarding "proven drinking during working hours," is not clear from the record. No other instances of dismissal for this infraction were cited by either Party as part of their respective cases. It appears, therefore, that we are dealing with a situation of first impression.

However, the Company is now giving notice that it will assert its right to discharge an employee for drinking during working hours. It is clear that from this point forward, employees are on notice that the Company will exercise its right of discharge for drinking during working hours, and further, those working hours include the break periods, whether or not they are taken on or off the premises.

There may well be other reasons in the history of the Grievant's total work record with the Company which would support the penalty of discharge. However, other than a prior one (1) day suspension in thirteen (13) years of employment, the record before the Hearing is silent on any such evidence. The work record of the Grievant over a thirteen-year period does merit consideration. To dismiss an employee of many years for a second offense, without proper warning of a potential discharge, normally presumes a degree of consistency by the Company in handling similar infractions involving the work force. Based upon the record, the instant case is somewhat precedential in character. Clearly, the prohibition against drinking during a work time period has been agreed to by the Parties. An employee can contractually be disciplined or dismissed for the offense of drinking "during working hours." Yet

there must also be a clearly understood and uniform application of the rule against drinking prior to its strict implementation. The offense of the Grievant merits appropriate punishment because his actions are found to be in violation of the contract and, as such, cannot be condoned.

The Grievant was not warned in clear and unambiguous terms that any subsequent proven offense concerning his drinking during the work day—even while on his break —would result in discharge. Had he been so warned, with the infraction proven, the penalty of discharge would have been sustainable.

Absent such a specific warning, the penalty of summary discharge is found to be too severe. However, given the nature of the proven offense, and weighing the prior warning for a similar infraction, a four (4) month disciplinary suspension, without pay, for the period November 1, 1981 to February 28, 1982 is warranted. Said suspension is to be considered as a warning that any subsequent similar future proven offense will result in discharge. The Grievant is to be reinstated at full salary and benefits, less any outside earnings and/or compensation, retroactive to March 1, 1982.

NOW, THEREFORE, as the duly selected Arbitrator, after having reviewed all of the data, testimony, and materials presented, I make the following:

AWARD

- That the Grievant was guilty of drinking during working hours, namely, on his break, and the Company had just cause for taking an adverse action against the Grievant.

Appendix E

* That the penalty of discharge is deemed too severe, absent proper notice of strict compliance to the no drinking rule.

* That an appropriate penalty, given the nature of the proven offense and the Grievant's prior letter of warning shall be:

> A four (4) month disciplinary suspension without pay for the period November 1, 1981 to February 28, 1982, with said suspension to stand as a warning that any subsequent future proven offense will result in discharge.

* That the Grievant be reinstated at full salary and benefits, less any outside earnings and/or compensation retroactive to March 1, 1982.

THOMAS F. CAREY
Arbitrator

Jericho, New York
April 20, 1982

Appendix E

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

On the 20th day of April 1982 before me came THOMAS F. CAREY, to me known to be the person who executed the foregoing Arbitration Award, and he duly acknowledged to me he executed the same.

JAMES JOSEPH GLENNON
NOTARY PUBLIC, State of New York
No. 30-6543135
Qualified in Nassau County
Commission Expires March 30, 1980

APPENDIX F

Collective Bargaining Agreement

AGREEMENT

between

SUPER TIRE ENGINEERING COMPANY

and

TEAMSTERS LOCAL UNION NO. 676

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[1]* INTRODUCTION:

THIS AGREEMENT made by and between SUPER TIRE ENGINEERING COMPANY, hereafter referred to as the "Employer" and TEAMSTERS LOCAL UNION NO. 676, affiliated with the International Brotherhood of Teamsters, hereinafter referred to as the "Union".

ARTICLE 1

SCOPE OF AGREEMENT

Section 1

Classifications Covered

Production Service Employees
Maintenance Regular Truck Drivers
located at or working from the Employer's plant in Cinnaminson and Pennsauken, New Jersey, and excluding all other employees, office clerical, driver-salesmen, guards, watchmen and supervisors.

Section 2

Transfer of Company Title and Interest

This Agreement shall be binding upon the parties thereto, their successors, administrators, executors, and assigns. In the event an entire operation is sold, leased, transfered, or taken over by sale,

* Figures in brackets are to page numbers of the Agreement.

transfer, lease, assignment, receivership, or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof.

On the sale, transfer, or lease it is understood by this Section that the parties hereto shall not use any leasing devices to a third party to evade this contract. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, leasee, assignee, etc., of the operation covered by this Agreement of any part thereof. Such notice shall be in writting with a copy to the local Union not later than ten (10) days prior to the effective date of sale or ten (10) days subsequent

• • •

[13] ARTICLE 4

SENIORITY PRINCIPLE

Section 3

(*b*) *Protection During Revocation of License*

exceed one year. In the event the employee should suffer a revocation of his driver's license because of some violation of any laws by the Employer, the Employer shall provide suitable and continued employment for such employee at not less than regular earnings at the time of his revocation of license for the entire period of revocation of license and the employee shall be reinstated in the seniority he held prior to the revocation of his driver's license, after his driver's license is restored.

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Section 4

Loss of Seniority

Seniority shall be broken and name removed from the seniority list for the following reasons:

(a) discharge for just cause;

(b) voluntary quit;

all unexplained absences for three consecutive days, which shall be deemed to constitute a voluntary quite;

(c) lay-off for two (2) years or more;

(d) failure to respond to notice of recall;

(e) unauthorized leave of absence.

Any employee who is absent because of medically certified illness or injury shall accumulate seniority for the purposes of determining his place on the seniority list, provided that habitual illness will be grounds for termination of employment. Medical certificate shall be necessary for return to duty after three (3) day absence.

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Section 5

Layoff and Recall

Should it become necessary to lay employees off because of lack of business, the Employer shall resort to strict

* * *

[20] ARTICLE 5

MAINTENANCE OF STANDARDS

Section 3

Work Week Reduction

In the event that the maximum work week is reduced by legislative act to a point below the regular work week provided herein, the contract shall be reopened for wage negotations only.

Section 4

New Equipment or Operations

Where new types of equipment and/or operations for which rates of pay are not established by this Agreement are put into use after June 25, 1971, within operations covered by this Agreement, rates governing such operations shall be subject to negotiations between the parties. Rates agreed upon or awarded shall be effective as of the date equipment or operations are put into use.

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ARTICLE 6

GRIEVANCES

Section 1

Grievance Machinery

All grivances or disputes arising under the terms of this Agreement shall be handled in the manner provided by the following sections:

First Step. In the case of any such grievance or dispute the Departmental Shop Steward or Committeeman shall take the matter up with the Employer or the Employer's representative within ten (10) working days after such grievance or dispute becomes known and every effort shall be made to reach a mutually satisfactory solution. The Departmental Shop Steward or Committeeman where the grievance had arisen, shall take the matter up with the Employer or Employer's representative. The Departmental Shop Steward or Committeeman may, if necessary, request the aggrieved to be present when discussing such matter with the Employer.

When a grievance has arisen and is presented to the employer in the first step of the grievance procedure, the Employer shall within five (5) working days, give his answer to the grievance, in writing.

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Second Step. If no solution can be reached, the Departmental Shop Steward or Committeeman shall refer the matter to the Business Agent, and the Business Agent may within fifteen (15) working days, take the matter up with the Employer or Employer's representative in an endeavor to adjust it amicably with the Departmental Shop Steward or Committeeman from such department where the grievance had arisen, is present.

Third Step. If the Business agent of the Union and the Employer or Employer's representative cannot reach a mutually satisfactory solution, the grievance shall within fifteen (15) working days be submitted to the President of the Union and the Personnel Director of the Employer.

Fourth Step. Should the President of the Union and the Personnel Director fail to come to any mutual agreement on such grievance or dispute, such grievance or dispute shall be submitted to a disinterested arbitrator, who is mutually agreed upon between the Employer and the Union. In the advent the Employer and the Union cannot agree on a disinterested arbitrator then the matter shall be submitted to the New Jersey State Mediation Service for selection of arbitrators; and such selection shall be by mutual agreement by the Employer and the Union.

The arbitrator shall within thirty (30) days of the closing of such hearing render a decision or decisions in such matter or matters which decision or decisions shall be final and binding on the parties. The cost of the arbitrator shall be borne equally between the parties.

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[22] ARTICLE 6

GRIEVANCES

Section 2

Inspection privileges

(*a*) *Acess to Premises*

Authorized agents of the Union shall have reasonable access to the Employer's premises at any time during working hours upon prior notice for the purpose of adjusting disputes, investigating working conditions, collection of dues, and ascertaining that the Agreement is being adhered to.

(*b*) *Inspection of Payroll Records*

Whenever a complaint is made concerning the wages, vacations and/or holidays of an employee, an authorized representative of the Union shall have the right to inspect Employer's payroll and time cards of the employee during the Grievance Procedure.

ARTICLE 7

PROTECTION OF RIGHTS

Section 1

Picket Lines

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary

action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and including primary picket lines at the Employer's place of business.

[23] ARTICLE 8

SEPARATION OF EMPLOYMENT

Upon discharge, the Employer shall pay all monies due to the employee. Upon quitting, the Employer shall pay all monies due the employee on the pay-day of the Employer in the week following such quitting. Upon discharge or quitting the employee shall immediately pay to the Employer all monies owed by him to the Employer and the Employer may deduct any such monies from any wages due the employee upon discharge or quitting.

ARTICLE 9

FIDELITY BONDS

Should the Employer require any employee to give bond, cash bond shall not be compulsory. Any premium involved shall be paid by the Employer. The primary obligation to secure the bond shall be on the Employer. The Employer shall have the right to require each applicant for a job that he fill out a job application and a bond application. Should

the Employer require a bond, the cost of this bond through the Employer's regular bonding company, should be borne by the Employer.

In the case of any employee hired on or after if the Employer cannot arrange for a bond through his regular bonding company, the Employer must notify the employee and the Union, in writing, that the employee has thirty (30) days in which to secure a bond satisfactory to the Employer. During the thirty (30) days, the employee shall be afforded the opportunity of working in some non-bondable work if such work is available. If the employee secures bond satisfactory to the Employer within thirty (30) days, the standard premium only in such bonding arrangement shall be paid by the Employer. Standard premium is that premium paid by the Employer for bonds applicable to other employees of the Employer in similar classifications. Any excess premium above this standard premium is to be paid by the employee. If the employee fails to secure bond within thirty (30) days, his employment shall cease.

Should the bond of an employee hired after
be cancelled, the employee shall be suspended, without pay. During the next thirty (30) days, the employee will be given the opportunity to secure a bond satisfactory to Employer. If the employee secures bond satisfactory to Employer within thirty (30) days, employee shall be returned to his job with seniority right restored. If the employee secures such bonds, the standard

* * *

Appendix F

[26] ARTICLE 13

ACCIDENTS AND REPORTS

Section 1

Reporting Accidents

Any employee involved in an accident shall immediately report said accident and any physical injuries sustained. When required by the Employer, the employee, before going off duty and before starting his next shift, shall make out an accident report in writing on company time, on forms furnished by the Employer, and shall turn in all available names and addresses of witnesses to the accident.

Section 2

Injury on the Job

(a) Any employee sustaining injuries which are compensable under the Workmen's Compensation Act, but which do not prevent him from performing his usual duties, but require that he visit the offices of Employer-designated physicians for the purpose of obtaining further treatment during working hours, shall suffer no loss of wages because of such visits.

(b) Any employee sustaining injuries which are compensable under the Workmen's Compensation Act which prevent him from performing all work

available to him, at Employer's place, shall sustain no loss of pay for the balance of the day on which he was injured. Ability to perform work shall be determined by doctor and/or hospital report.

[27] ARTICLE 14

MEAL PERIODS

Section 1

Lunch Period

All employees shall receive a lunch period at the end of the fourth hour of work. The lunch period shall be one-half (½) hour. Any employee required to work during more than fifteen minutes after the start of his lunch period shall receive time and one-half for such lunch period, and may not be dismissed one-half hour earlier, but shall work the necessary hours whereby producing one-half hour overtime at the end of his working day.

Any employee who is required to work through his lunch period, as stated above, shall be afforded a twenty-minute break period to eat his lunch, on Company time, after the fourth hour and not later than the fifth hour.

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Section 2

Supper Period

Any employee required to work in excess of two (2) hours overtime in any one (1) day shall be afforded a twenty (20) minute break period on Company time.

ARTICLE 15

DISCHARGE OR SUSPENSION

Section 1

Cause for Dismissal or Suspension

No employee may be discharged or suspended without just cause. Nothing shall prohibit the Union from investigating any dismissal or suspension and resorting to the Grievance Procedure provided in this Agreement.

Until the case has been discussed with the Business Agent, no employee may be dismissed or suspended except where the provisions of this Section provide for immediate dismissal. In the event that it is decided, as provided in the Grievance Procedure set forth in this Agreement, that the suspension or discharge was without just cause, the decision shall provide for reinstatement with or without back pay. If the decision directs reinstatement with pay, the Employer shall not receive any credits for wages

or compensation earned by the employee while he was out of the Employer's employ. Except where an emergency prevents it, grievances concerning dismissal or suspension shall be advanced over all other matters pending for grievance hearings, and shall be promptly heard. Except in the case of immediate dismissal for the causes set forth below, no employee may be dismissed or suspended for his first offense, but shall receive at least one written warning. Warning notices for absence or lateness must be given within five (5) work days; warning notice for all other violations must be given within three (3) work days following day of violation. The parties agree that causes for dismissal without first discussing the matter with the Business Agent shall be the following:

(1) Calling or participating in any unauthorized strike, work stoppage, or walk-out.

(2) Drunkenness, proven drinking during working hours, or being under the influence of alcohol or unlawful narcotics during working hours.

(3) Theft or dishonesty.

(4) Assault on his Employer or his Employer's representative during working hours.

(5) Carrying unauthorized passengers in Employer's vehicle.

(6) Assault by an employee against his fellow workers during working hours.

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(7) Deliberate vandalism or defacing Company property and equipment, or, in this case, in lieu of discharge, financial action may be taken against the employee.

In each instance, the Employer shall promptly notify the Union of the action taken, in writing, promptly upon such action.

The parties agree that a dismissal or suspension shall not be subject to the Grievance Procedure or arbitration as provided in this Agreement unless the Union shall have notified the Employer in writing of the intention to do so within two (2) weeks of dismissal or suspension. The parties recognize that in interpreting previous agreements there have been difficulties over whether or not the Employer may dismiss employees for slow-downs. The parties agree that this matter is cause for discharge.

Section 2

Warning Notices

Warning Notices shall not remain in effect for a period of more than six (6) months from the date of such warning notice. An employee shall not be suspended until the Local Union has been given forty-eight (48) hours written notice. Saturdays, Sundays and Holidays shall be excluded in determining the forty-eight (48) hour period.

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ARTICLE 16

DISCRIMINATION

There shall be no discrimination by the Employer against his employees because of Union activities; nor shall there be any discrimination against any employee because of race, color, creed, sex, age, or nationality, in the placement and rentention of employment, or in the hours, wages, or working conditions of the employees.

ARTICLE 17

SUBCONTRACTING

The Employer agrees that it will not cease or refain from handling, using, transporting or otherwise delivering any products of any other employer or cease doing business with any other person, or wherein any other obligation imposed by the Motor Carrier's Act or other applicable law as a result of an individual employee exercising their rights under this Agreement or under the law, but the Employer shall not withstanding any other provision in this agreement, when necessary, continue doing business by other employees. For the purpose of preserving and protecting work and job opportunities under this Agreement, and for the duration of this agreement, the Employer agrees that it will not subscontract, transfer, lease, assign or convey, in whole or part, any work presently being performed under this contract, work to any

other plant, division, or other operations within the department covered by this agreement, or to non-unit employees, unless all

[30] ARTICLE 17

SUBCONTRACTING

regular full-time employees in a department are give work opportunities including any and all laid off employees. In the event the Employer subcontracts out work from any department and subsequently thereafter employees are laid off from any department because of such subcontracting of work, then the employer shall return such work to the department affected to prevent layoff of employees.

ARTICLE 18

WORK IN OTHER CLASSIFICATIONS

Employees who are required to work in more than one job classification during their working hours of any day shall be paid for that entire day at the rate of the highest job classification worked.

ARTICLE 19

WORK ASSIGNMENTS

Except as to past practice, the Employer shall not direct, require or permit employees other than the

employees within the bargaining unit here involved to perform work which is recognized as the work of the employees falling within the scope of this Agreement, or direct, require or permit employees who are covered within this Agreement to perform work which does not fall within the scope of this Agreement.

ARTICLE 20

PAID FOR TIME

Section 1

General

All employees covered by this Agreement shall be paid for all time spent in the service of the Employer.

Section 2

Break Periods

All employees shall receive a ten (10) minute break period in the a.m. and a ten (10) minute break period in the p.m., without loss of pay.

Section 3

Death in Family

In the event of a death in an employee's immediate family which consists of parents, wife, husband,

children, brothers, sisters, mother-in-law, or grandparent(s), the employee shall be allowed up to three (3) days leave at straight time pay provided that such days leave occur

* * *

[48] ARTICLE 33

MAINTENANCE DEPARTMENT

in excess of first class skill rate will be posted by the employer.

(3) Maintenance men entering or leaving Company Shop area who are carrying tools will be allowed the nearest entrance or exit to work shop area.

(4) The Employer will provide first aid chest and oxygen in Maintenance Shop.

(5) The Employer shall provide adequate work space in Maintenance Shop well lighted and ventilated.

(6) The Company shall not change regular starting times unless there is a 48 hour notice to the regular change. Saturdays and Sundays are excluded. When changing regular shifts the Company shall notify the employees one week before the change is put into effect. Emergancies excepted.

Appendix F

ARTICLE 34

TERM OF AGREEMENT

This Agreement shall become effective upon the expiration of the current Agreement, June 14, 1980, and shall remain in full force and effect until and including June 14, 1983, and shall continue in force from year to year thereafter unless and until either of the parties hereto shall give to the other party sixty (60) days written notice prior to the end of the original term in 1983, or sixty (60) days written notice prior to the end of any subsequent year, of an intention to terminate at the end of the original term or of the then current year. In the event of an inadvertent failure by either party to give the notice set forth herein, such party may give such notice at any time prior to the termination or automatic renewal date of this Agreement. If a notice is given in accordance with the provisions of this Section, the expiration date of this agreement shall be the sixty-first (61st) day following such notice.

Appendix F

IN WITNESS WHEREOF, the parties hereto have set their hands and seals to this Agreement, in triplicate, as of the 14th day of June, 1980.

FOR THE UNION:

TEAMSTERS LOCAL #676

By: JOHN P. GREELEY,
President

Dated: June 24, 1980

FOR THE EMPLOYER:

SUPER TIRE ENGINEERING COMPANY

By: ABRAHAM R. SCHAEVITZ,
President

Dated: June 23, 1980

APPENDIX G

Decision of the United States Court of Appeals for the Sixth Circuit re: *Morgan Services, Inc.* v. *Local 323*

MORGAN SERVICES, INC. v. LOCAL 323

U.S. Court of Appeals
Sixth Circuit (Cincinnati)

MORGAN SERVICES, INC. v. LOCAL 323, CHICAGO AND CENTRAL STATES JOINT BOARD, AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, No. 82-3728, January 11, 1984

CONTRACTS

1. Discharge—Insubordination—Arbitration: 118.02, 118.652, 118.305, 94.117

Collective bargaining contract's clause providing that employer may discharge "without redress" employees guilty of insubordination is applicable to arbitration over grievance of discharged employee, where arbitrator clearly found that employee's actions constituted insubordination.

ARBITRATION

2. Discharge—Insubordination—Ambiguity in contract—Authority of arbitrator: 118.03, 94.559, 24.15

Arbitrator exceeded his authority under collective bargaining contract by ordering reinstatement of employee who was discharged for insubordination, where contract clause, which provides employer with right to discharge

"without redress" employees guilty of insubordination, unambibuously vests power to determine appropriate sanctions solely with employer. Words "without redress" have ordinarily meaning that is manifest without need for construction; award failed to draw its essence from contract because arbitrator was unable to hypothesize contractual construction that would empower him to modify employer's determination of appropriate sanction of insubordination; arbitrator may not look beyond cntract and use extraneous considerations to render contract's clear language ineffective.

Appeal from the U.S. District Court for the Northern District of Ohio, Affirmed.

Larry D. Farley (Joseph J. Allotta and Allotta, Singer & Farley, with him on brief), Toledo, Ohio for appellee.

Thomas Canafax, Jr. (Lawrence D. Ehrlich, Borovsky, Ehrlich & Kronenberg, Chicago, Ill. and Charles S. Wittenberg, Toledo, Ohio, with him on brief), for appellant.

Before Engel and Contie, Circuit Judges; and Gibson, Senior Circuit Judge.*

Full Text of Opinion

Contie, Circuit Judge:—Appellee Morgan Services, Inc., brought this action under §301 of the Labor Management Relations Act, 29 U.S.C. §185, to vacate an arbitration

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* The Honorable Floyd R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

award ordering the reinstatement of an employee who had been discharged for insubordination. The district court entered judgment for Morgan Services on the ground that the arbitrator had exceeded his authority by improperly modifying the Company's sanction for the employee's misconduct. The defendant, Local 323, Chicago and Central States Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, appeals. This court has jurisdiction under 29 U.S.C. §185 and 28 U.S.C. §1291. We affirm.

I.

Morgan Services provides linens and other laundered items to businesses in the Toledo, Ohio area. It employs drivers to service its customers along established routes. The drivers' principal duties are delivering clean linen, picking up soiled linen for laundering, maintaining an inventory of the linen on each customer's premises, and soliciting new customers. Prior to 1980, the inventories were effected by simply counting the number of soiled items picked up from each customer. When the company needed more detailed inventories, supervisory personnel usually performed them.

Early in 1980, Morgan Services decided that it was necessary to conduct more detailed inventories on a regular basis. To implement this new policy, the Company directed its drivers to conduct a detailed inventory on three customers each day.[1] This new, more detailed in-

[1] Each of the four drivers had approximately 120 customers on his route. Of these, 30 to 40 would be serviced by a driver on a particular day.

ventory involved counting the number of linens delivered, those picked up, and those remaining on the customer's premises.

One of the drivers, Clyde Childress, was dissatisfied with this new arrangement. A supervisor testified that on several occasions he had to prod Childress into completing the required inventories.[2] By May of 1980, Childress had almost completely stopped performing inventories. As of May 21, he had completed only one inventory for the entire month.

Matters came to a head during a meeting between the drivers and their supervisor on the morning of May 21, 1980. At this meeting, the supervisor reminded the drivers, as he had previous, of the need to complete three inventories a day. The supervisor stated that if he did not receive the inventories he would take "necessary actions." Childress responded that it was not the drivers' responsibility to take the inventories and that, since they had inventoried all their customers once, there was no need for further inventories. The supervisor told Childress that if he believed drivers should not be doing this type of work, he should file a grievance to resolve the problem.

When Childress returned to the Company premises after completing his deliveries on that day, the supervisor confronted Childress and asked him why he had not taken any inventories on the preceding day, May 20. The supervisor testified that Childress reiterated his earlier position that detailed inventories were not his job. After

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[2] The supervisor testified that he had to remind Childress of the necessity of completing his inventories and that, after being reminded, Childress would complete inventories "for a couple of days," but would soon cease to submit the inventories.

the supervisor threatened to "write up" Childress if he did not submit the required inventories, Childress, according to the supervisor, once more stated that inventories were not his responsibility. Childress testified that, when asked why he had not done any inventories on May 20, he had merely stated: "I'm not going to take it any more." Childress' supervisor then discussed the problem with the Company's general manager. It was decided that Childress would be suspended.

Within a few days representatives of the Company and the Union met with Childress to discuss the situation. Childress again stated that inventories were not his job and that, in any event, since each customer had been subjected to one detailed inventory, he thought it unnecessary to continue the process. Morgan Services learned at this meeting that Childress had completed three inventories on May 21. Despite this, the Company concluded after the meeting that Childress would be discharged for insubordination because of his repeated statements that he would not perform inventories. Childress then filed a grievance over his discharge. The matter was later submitted to arbitration pursuant to Article X of the collective bargaining agreement.

Article XIII, § 1 of the collective bargaining agreement contained a general "Management Rights" clause which provided that "[e]xcept as specifically provided to the contrary in this Agreement," Morgan Services is "vested exclusively" with the power to, *inter alia,* "discharge employees for cause . . . to determine the amount and quality of the work needed; by whom within the bargaining unit such work is to be performed . . . and be responsible for the assignments of duties." This section also empowered the Company to "adopt reasonable shop rules." The Un-

ion had an opportunity under this provision to grieve and arbitrate the content of the shop rules.[3]

Article IX of the agreement provided that "[n]o employee shall be dismissed without just cause," and that "[a]ny employee may be discharged without regress [sic] if proven guilty of . . . insubordination."[4] In addition, a

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[3] The full text of Article XIII, § 1 reads as follows:

MANAGEMENT RIGHTS

> Except as specifically provided to the contrary in this Agreement, the Management of the Company's business and the direction of its workforce is vested exclusively in the Company including (but not limited to) the right of the Company to direct and supervise the work of its employees to hire, promote, transfer, layoff, demote, suspend, discipline or discharge employees for cause (all of which shall be subject to the term of this Agreement); to plan, direct and control its operations; to determine the amount and quality of the work needed; by whom within the bargaining unit such work is to be performed; to introduce new and improved methods or facilities; to schedule hours of work and be responsible for the assignments of duties. The Company may also adopt reasonable shop rules, provided, however, that prior to their being put into effect, the Union shall be served a copy of such proposed work rules. The Union may protest their reasonableness through the grievance and arbitration provisions of this Agreement.

[4] The full text of Article IX read as follows:

DISCHARGE

> No employee shall be dismissed without just cause. If an employee is dismissed and he feels that he has been unjustly dealt with, he must file his complaint within five (5) working days of the dismissal. If it is found upon due investigation that such employee has been unjustly dismissed he

(Footnote continued on following page)

shop rule promulgated under the Management Rights clause provided that "an employee will be subject to immediate discharge" for "[i]nsubordination, including refusal to obey reasonable order of any supervisor during work time."

The arbitrator found the facts to be those stated above. He interpreted Article IX of the collective bargaining agreement, however, as allowing him to modify the Company's sanction for insubordination. To the Company's argument that the phrase "[a]ny employee may be discharged without redress if proven guilty of . . . insubordination" unambiguously prohibited the arbitrator from reducing the sanction for insubordination, the arbitrator responded cryptically that this "reading of the language would require the addition of conditions which do not now appear in the agreement." The arbitrator found that "it is impossible to glean the meaning . . . intended" by the phrase "without redress." He concluded that because there was no "clear and express contract statement of the intent of the parties in adopting the words in question, an arbitrator should not impart to them a meaning which significantly varies from customary arbitral procedures." The arbitrator, apparently applying "customary arbitral procedures," then ordered reinstatement because Childress had worked for Morgan Services for 31 years, because he

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(Footnote continued from preceding page)

> shall be restored to employment and shall be paid for all time lost at this usual rate of compensation. An employee may be discharged without regress [sic] if proven guilty of theft, drunkenness, drinking intoxicants while on duty, the use of hallucinatory drugs or insubordination.

The arbitrator found that "regress" was a typographical error and that "redress" was intended. This is surely correct.

had a relatively satisfactory work record,[5] and because "discipline should be progressively applied as a corrective measure." His award reads as follows:

> The grievance is granted in part and denied in part. Discharge was too severe a penalty for grievant's misconduct. It hereby is set aside and held for naught, and a disciplinary suspension is substituted therefor.

Grievant forthwith shall be reinstated with full seniority but without back pay or benefits.

The district court recognized its narrow standard of review, but nonetheless found that the award conflicted with the terms of the agreement. Specifically, the district could held that the provision allowing the Company to discharge an employee "without redress" unambiguously vested Morgan Services with the sole discretion in determining the proper sanction for insubordination. The arbitrator, according to the district court, therefore exceeded his contractual powers in modifying the sanction imposed by the Company. We conclude that the district court correctly vacated the award.

II.

The standard of review of an arbitrator's decision is, of course, very narrow. General Telephone Co. of Ohio v. Communications Workers of America, 648 F.2d 452,

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[5] The only incidents of misconduct on Childress' work record occurred in 1979. In that year, the Company discharged him for a refusal to solicit new customers. The discharge was reduced to a three-day suspension following the submission of a grievance. Childress also received a written reprimand in 1979 for poor work performance.

456, 107 LRRM 2361 (6th Cir. 1981). Since the parties have "bargained for the arbitrator's decision, not the court's" Anaconda Co. v. District Lodge No. 27 of the International Association of Machinists, 693 F.2d 35, 37, 111 LRRM 2919 (6th Cir. 1982) (per curiam), courts are limited to determining whether an award "draws its essence from the collective bargaining agreement." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 46 LRRM 2433 (1960). Thus, although the "refusal of courts to review the merits of an arbitration award is the proper approach," id. at 596, we must examine the award to determine if it is fundamentally at odds with the collective bargaining agreement because arbitrators do not have the "authority to disregard or modify plain and unambiguous provisions" of the agreement. Detroit Coil Co. v. International Association of Machinists, Lodge #82, 594 F.2d 575, 579, 100 LRRM 3138 (6th Cir.), cert. denied, 444 U.S. 840, 102 LRRM 2360 (1979).

III.

[1] As a threshold matter, the Union argues that the provision in Article IX dealing with insubordination is not controlling because the arbitrator did not find that Childress' actions amounted to insubordination. The Union asserts in its brief that "[n]owhere in the arbitrator's award opinion does he specifically find that Mr. Childress was guilty of insubordination." Brief of Appellant at 23. The Union argues that the arbitrator instead found only "contractual misconduct." Were the Union's contention correct, then our analysis would have to proceed on a different basis.[6]

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[6] If the Union is correct, then the question is not whether the Company had the unfettered power to discharge for insubordination under the "without redress" clause, but whether the discharge was appropriate, considering all the circumstances, under the "just cause" provision. See supra note 4.

Appendix G

Although the arbitrator did not use the exact words, "Childress was guilty of insubordination," to argue that he did not find insubordination and did not clearly state that finding in his opinion exalts the arbitrator's form of expression over his clearly intended meaning. This is what the arbitrator said about insubordination: "Although the Union argues grievant's conduct and actions which resulted in his . . . discharge on May 28 *did not constitute insubordination, the facts clearly support an opposite finding.*" (Emphasis added). There can be only one "finding" which is the "opposite" of the Union's argument to the arbitrator that Childress' acts "did *not* constitute insubordination": Childress *did* commit acts constituting insubordination. We decline the Union's invitation to parse the arbitrator's opinion so finely that its meaning is made to seem the opposite of what was obviously intended. The arbitrator clearly found that Childress' actions constituted insubordination.[7]

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[7] The arbitrator also stated that Childress had made an "actual refusal . . . to perform required work" and that "management was fully justified in accepting his statement as a refusal of a work directive."

The Union argues that Childress had a good faith belief that, because he had inventoried all his customers once, he had fully discharged his assigned duties. Since the arbitrator found insubordination and this finding is amply supported by the record, we respond to this contention only in passing. First, Childress' claimed misconception was corrected by his supervisor during the May 21 meeting. Childress twice stated his intention not to perform inventories *after* this meeting. Second, the arbitrator found that Childress had inventoried "only about one-half" of his customers, contrary to Childress' assertion. The arbitrator found that this discrepancy made Childress' assertion of a good faith belief that he had fully performed his duties unworthy of credence.

Appendix G

IV.

Since the arbitrator found that Childress did commit insubordination but nonetheless modified the Company's sanction, the question then becomes one of the relative powers of the Company and the arbitrator under the collective bargaining agreement. The Company successfully argued before the district court that the provisions of Article IX addressing the power to discharge for insubordination unambiguously vested sole discretion with the Company to determine whether a discharge for Childress' insubordination was appropriate. The Union argues that the arbitrator correctly found this provision to be ambiguous and construed the ambiguity to permit arbitral review of the Company's decision to discharge Childress for insubordination. The district court was without authority, the Union argues, to reinterpret the agreement after the arbitrator found it ambiguous. Thus, the central issue is whether determining the appropriate sanction for insubordination is a function delegated solely to the Company or whether it is a matter initially for the Company but subject to review and modification by the arbitrator.

The resolution of this case turns on whether the phrase "without redress" is ambiguous. It is well established that the power to construe ambiguous contract provisions lies with the arbitrator, see, e.g., United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 585, 46 LRRM 2416 (1960) (a court "should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement"); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 46 LRRM 2423 (1960) ("the question of interpretation of the collective bargaining agreement is a question for the arbitrator");

Timken Co. v. United Steelworkers of America, 492 F.2d 1178, 1180, 85 LRRM 2532 (6th Cir. 1974) ("[i]f a collective bargaining agreement is unclear and ambiguous in its terms, its construction should normally be determined by the arbitrator"), and that an arbitrator may reduce an employer's sanction for proven misconduct when the agreement can be fairly interpreted to give the arbitrator the power, see, e.g., Anaconda Co. v. District Lodge No. 27 of the International Association of Machinists, 693 F.2d 35, 37, 111 LRRM 2919 (6th Cir. 1982) (per curiam); Fabricut, Inc. v. Tulsa General Drivers, Warehousemen and Helpers, Local 523, 597 F.2d 227, 229-30, 101 LRRM 2148 (10th Cir. 1979); Falls Stamping & Welding Co. v. UAW, 575 F.2d 1191, 1192, 98 LRRM 2530 (6th Cir. 1978) (per curiam); Timken Co., 492 F.2d at 1180. It is equally well established, however, that an arbitrator cannot ignore plain and unambiguous language in the collective bargaining agreement, see, e.g., Sears, Roebuck & Co. v. Teamsters Local Union No. 243, 683 F.2d 154, 155-56, 110 LRRM 3175 (6th Cir. 1982) (per curiam), cert. denied, 103 S.Ct. 1274, 112 LRRM 2896 (1983); Detroit Coil Co. v. International Association of Machinists, Lodge #82, 594 F.2d 575, 579, 100 LRRM 3138 (6th Cir.), cert. denied, 444 U.S. 840, 102 LRRM 2360 (1979), and that an arbitrator may not modify an employer's sanction for employee misconduct when a collective bargaining agreement clearly vests the power to determine appropriate measures with the employer, see, e.g., International Brotherhood of Firemen and Oilers, Local No. 935-B v. Nestle Co., Inc., 630 F.2d 474, 477, 105 LRRM 2715 (6th Cir. 1980); Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692, 695, 96 LRRM 3320 (10th Cir. 1977); Amanda Bent Bolt Co. v. UAW, 451 F.2d 1277, 1280, 79 LRRM 2023 (6th Cir. 1971); Local 342, UAW v. T.R.W., Inc., 402 F.2d 727,

730-31, 69 LRRM 2524 (6th Cir. 1968), cert. denied, 395 U.S. 910, 71 LRRM 2253 (1969). Thus, if the agreement is ambiguous, the arbitrator could construe it as allowing him to modify a sanction for insubordination; if there is any basis for that construction in the agreement, we lack authority to alter the arbitrator's determination. On the other hand, if the agreement unambiguously allocated the power to discharge for insubordination solely to the Company, then the arbitrator was without power to modify the Company's sanction.[8]

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[8] The Union states in its brief that "[o]nce Arbitrator Walt found an ambiguity in the language of the collective bargaining agreement, the District Court could not reverse his decision simply because its interpretation of the ambiguity differs from that of the arbitrator." Brief of Appellant at 15. Implicit in this argument is the erroneous notion that if an arbitrator finds a provision to be ambiguous, his decision construing that provision is absolutely immune from judicial review. This argument also misconceives the thrust of the district court's analysis. It did not vacate the arbitrator's award "simply because its interpretation of the ambiguity differs" from the arbitrator's. Rather, it reversed the arbitrator's decision because it found the agreement to be unambiguous.

Insofar as the Union argues that the construction of ambiguities in collective bargaining agreements is a task for arbitrators and not for courts, it is correct. But insofar as it argues that the threshold determination that a given provision is ambiguous is *exclusively* a question for the arbitrator, it errs. If the Union's position were accepted, then the rule that arbitrators cannot ignore or modify unambiguous contract provisions would be wholly nugatory; an arbitrator could easily circumvent this rule by making a finding that a provision is ambiguous when in fact it is not. The initial question of whether an ambiguity exists is amenable to judicial review to the same extent and in the same manner as other decisions of arbitrators. That is, the determination that an ambiguity exists will

(Footnote continued on following page)

[2] Upon reviewing the record and the arguments of the parties, we find that the district court was correct in concluding that the agreement's statement that "[a]ny employee may be discharged without redress if proven guilty of . . . insubordination" is unambiguous. This case is therefore governed by those authorities which hold that an arbitrator is without authority to disregard or modify plain and unambiguous language in the collective bargaining agreement. See Sears, Roebuck and Co., 683 F.2d 154, 110 LRRM 3175; Timken Co., 482 F.2d 1012, 83 LRRM 2814; Amanda Bent Bolt Co., 451 F.2d 1277, 79 LRRM 2023; T.R.W., Inc., 402 F.2d 727, 69 LRRM 2524. As we said in Sears, Roebuck and Co., the "clause before us simply cannot be characterized as 'ambiguous' or subject to conflicting interpretations." Sears, Roebuck and Co., 683 F.2d at 156. We rely on several factors in reaching this conclusion.

First, we note that a "collective bargaining agreement is after all a contract." Timken Co. v. Local Union No. 1123, United Steelworkers of America, 482 F.2d 1012,

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(Footnote continued from preceding page)

be reviewed to determine whether this decision draws its essence from the agreement. See Enterprise Wheel & Car Corp., 363 U.S. at 597. This is to be contrasted to the situation in which an arbitrator adopts one of several possible conflicting constructions of an unclear provision in a collective bargaining agreement. In the latter situation, court will rarely, if ever, substitute their own judgment for that of the arbitrator. See generally Retail Clerks Union Local No. 1557 v. Murfreesboro Vending Service, Inc., 689 F.2d 623, 626, 111 LRRM 2588 (6th Cir. 1982) (per curiam) (courts should not be concerned with whether an arbitrator has given an agreement the "best" interpretation; rather, the inquiry is ended if the arbitrator has provided a "permissible" interpretation).

1015, 83 LRRM 2814 (6th Cir. 1973) and courts should "interpret the words in a contract of this nature to give them their ordinary and reasonable meaning," Penn Packing Co., Inc., v. Amalgamated Meat Cutters and Butcher Workmen, Local 195, 497 F.2d 888, 891, 86 LRRM 2657 (3rd Cir. 1974) (footnote omitted). The words "without redress" as they appear in the provision in question have an ordinary meaning that is manifest without any need for construction: once it is determined that an employee has engaged in insubordination, the employer's decision to discharge the employee is not open to review by the arbitrator.[9]

Second, it is highly significant that in attempting to demonstrate the ambiguity of the provision on insubordination the arbitrator was unable to hypothesize a construction that would empower him to modify the employer's determination of an appropriate sanction for

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[9] The Union also urges that the district court erred in relying on Nestle Co., 630 F.2d 474, 105 LRRM 2715, because the collective bargaining agreement in Nestle provided that insubordination "shall constitute cause for dismissal" of an employee but that the collective bargaining agreement in the present case provides only that an "employee *may* be discharged" for insubordination. See Nestle Co., 630 F.2d at 475. Although the Nestle court did note a distinction between the words may and shall, see id. at 476, this difference is not conclusive as to the question before us. In Amanda Bent Bolt Co., 451 F.2d 1277, 79 LRRM 2023, the collective bargaining agreement also provides that the employer "may" discharge an employee for certain acts, see id. at 1279, but this did not preclude a construction of the agreement which forbade arbitral review of the discharge decision. The only effect of the word "may" is to indicate that the sanction of discharge is within the employer's discretion. Cf. Mistletoe Express Service, 566 F.2d at 695 ("We find no ambiguity in the use of 'may' rather than 'will.' The provision gives the employer the option to discharge or not.").

insubordination. The arbitrator postulated three possible meanings which could be given to the phrase "without redress." First, it could mean that an employee could not even grieve a discharge for insubordination. Second, this language could mean "that a discharge always is warranted for certain stated infractions." Third, it could mean that "once the penalty was determined by the Company, it could not be modified or reduced by an arbitrator." Under any of these constructions, the net effect is that the Company is granted the power to determine the appropriate sanction for insubordination and that this determination is not subject to arbitral review.[10] Despite his inability to construe the phrase "without redress" in such a way as to enable him to review the Company's decision to discharge Childress, the arbitrator concluded that he had authority to review and modify this determination. In such a circumstance, it cannot be said that the arbitrator's award draws its essence from the collective bargaining agreement.

Since the agreement contained an express and unambiguous reservation on the arbitrator's powers, the arbitrator could not base his award on "customary arbitral procedures" that conflict with the agreement. We recognize that an arbitrator "may of course look for guidance from many sources," Enterprise Wheel & Car Corp., 363 U.S. at 597, including "the industrial common law—the practice of the industry and the shop," Warrior & Gulf Navigation Co., 363 U.S. at 581-82, but when the collective bargaining agreement answers the question submitted to the

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[10] We also find it relevant that the only difference between the second and third meaning proposed by the arbitrator is in their formulation. Thus, the arbitrator found only two possible constructions, both of which supported the Company's position.

arbitrator in clear and unambiguous language, the arbitrator errs if he looks beyond the contract and uses extraneous considerations to render the contract's clear language ineffective. A provision in a collective bargaining agreement cannot be treated as ambiguous and then ignored simply because it varies from the arbitrator's expectations. Collective bargaining agreements, like all contracts, are a species of private law. These agreements are made in "an effort to erect a system of industrial self-government." Id. at 580. The parties to such agreements are free to establish procedures which are different from those of other parties. The parties in this case evidently chose to adopt procedures which vary from what is, in the arbitrator's opinion, "customary." In substituting his view of what the parties should have agreed to for what the parties actually did agree to, the arbitrator was dispensing "his own brand of industrial justice." See Enterprise Wheel & Car Corp., 363 U.S. at 597.

In conclusion, the collective bargaining agreement clearly and unambiguously vested the power to determine the appropriate sanction for discharge solely with the Company. The arbitrator exceeded his contractual powers by reviewing this decision and the district court correctly vacated the ward. The judgment of the district court is therefore AFFIRMED.

Office - Supreme Court, U.S
FILED
MAY 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1500

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

SUPER TIRE ENGINEERING COMPANY,
Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Did the opinion and award of Arbitrator Thomas Carey rendered on April 20, 1982 fail to draw its essence from the collective bargaining agreement between the parties?

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STATEMENT OF THE CASE

This case involves an effort by Super Tire Engineering Company ("Super Tire" or "the Company") to overturn a labor arbitration award. Super Tire and Teamsters Local Union No. 676 ("Local 676" or "the Union") are parties to a collective bargaining agreement. (Appendix F, attached to Petition for Writ of Certiorari, filed March 8, 1984.)[1] Article 6, Section 1 of the agreement provides for a grievance machinery culminating in arbitration to resolve disputes between the parties. (App. F at 57a-58a) Article 15 controls the discharge and suspension of employees. (App. F at 64a-66a) Pursuant

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[1]All references to the appendix refer to the appendices incorporated in the Petition for Writ of Certiorari filed by the petitioner on March 8, 1984.

to the contract, the Union challenged the discharge of employee Mitchell Gray which occurred on October 30, 1981. The matter was submitted to the New Jersey State Board of Mediation and a hearing was held before Arbitrator Thomas F. Carey on February 22, 1982. In an opinion and award rendered on April 20, 1982, the arbitrator overturned the discharge and ordered that Gray be returned to work subject to a four-month disciplinary suspension. (App. E at 27a-45a)

Certain portions of the collective agreement were directly involved in the arbitrator's decision. Article 15, Section 1 provides in relevant part:

> No employee may be discharged or suspended without just cause...Until the case has been discussed with the Business Agent, no employee may be dismissed or suspended except where the provisions of this

> Section provide for immediate dismissal...Except in the case of immediate dismissal for the causes set forth below, no employee may be dismissed or suspended for his first offense, but shall receive at least one written warning...The parties agree that causes for dismissal without first discussing the matter with the Business Agent shall be the following:
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> . . .
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> (2) Drunkenness, proven drinking during working hours, or being under the influence of alcohol or unlawful narcotics during working hours.

(App. F at 64a-65a)

In his opinion, the arbitrator first determined that the Company had met its burden of proving that the employee did drink during working hours. (App. E at 37a-39a) The arbitrator then turned to the contract to determine the effect of his factual finding. He noted that the

contract gives the Company the right to discharge employees guilty of certain offenses, including drinking, without first notifying the Union but he recognized that the contract also contains a "just cause" provision. The arbitrator ruled that the two sections "should be read in pari-materia" and continued:

> The Company's right to act under Article 15 is tempered, at least to the degree that such action need be exercised in a fair and even manner, rather than in an arbitrary or capricious fashion. Further, its intent to adhere to a strict application of conditions and requirements of Article 15 requires some form of advance notice.

(App. E at 40a)

Having concluded that the employee was guilty of the misconduct with which

he was charged and that a "just cause" determination was necessary in order to resolve the grievance, Arbitrator Carey undertook an examination of what he considered to be the background necessary to resolve the dispute. Regarding the application of the rule prohibiting drinking, the arbitrator noted that there were no prior instances of dismissal for this infraction and concluded that he was faced "with a situation of first impression." (App. E at 42a) The arbitrator stated that the grievant had faced discipline once before as a result of a drinking incident, although he noted that there was a dispute in the record as to whether the punishment in that case was for drinking or for refusal to leave the Company's premises when told to do

so. (App. E at 40a) In that instance, Mr. Gray was issued a notice of termination but this discipline was then rescinded by Super Tire and a one-day suspension was substituted.

In the letter advising Gray that it was rescinding the termination, Super Tire told him that he should "[p]lease remember that there is to be no drinking of alcoholic beverages on company premises nor during working hours." Arbitrator Carey quoted this portion of the letter and stated that it lacked a clear threat or warning that discharge would follow in the event of a future violation. He concluded:

> This lack of specificity in its warning is critical, given the fact that there had been no other prior application to any other employee of its strict adherence policy to this particular prohibition concerning

> drinking. Nor was such intent to strictly comply ever previously made known to the work force in general.

(App. E at 41a-42a)

Arbitrator Carey also discussed the past record of the grievant. He noted that Gray had been employed by Super Tire for thirteen years and that the only prior disciplinary infraction raised against Gray was the one-day suspension. "The work record of the Grievant over a thirteen-year period does merit consideration." (App. E at 42a) The arbitrator concluded that in light of all of these circumstances, the discharge penalty was too severe to withstand the contractual requirement for "just cause" and he ordered that a four-month disciplinary suspension be substituted for the discharge. The grievant was to

be reinstated with full salary and benefits, less outside earnings and/or compensation, retroactive to March 1, 1982. Additionally, the arbitrator stated that the suspension would be considered a final warning to the employee regarding any similar offense in the future. (App. E at 43a-44a)

By petition filed with the United States District Court for the District of New Jersey on June 16, 1982, Super Tire asked that the award of Arbitrator Carey be vacated as invalid and illegal. Local 676 answered and counterclaimed for enforcement of the award. Jurisdiction was based on 29 U.S.C. §185(a). The matter was heard by the district court on cross-motions for summary judgment and an order was issued on September 13, 1982

granting the Company's motion for summary judgment and denying the Union's cross-motion. (App. D at 25a-26a)

Local 676 appealed the decision of the district court and the Court of Appeals for the Third Circuit reversed. The court of appeals noted that although the collective agreement states that an employee found to be drinking during working hours "may be dismissed or suspended for his first offense," nothing in the contract precludes review of such discipline as to the existence of just cause. Additionally, it noted that while such drinking is cause for "immediate dismissal," there is no provision equating causes for immediate dismissal with "just cause" for discharge. (App. A at 7a) The court of appeals reaffirmed

its decision in Arco-Polymers, Inc., v. Local 8-74, 671 F.2d 752 (3rd Cir. 1982), cert. denied, -- U.S.--, 103 S.Ct. 63 (1983). The court there had ruled that a labor contract providing for "just cause" for discharge and also speaking of specific offenses which make an employee subject to discharge may properly be read by an arbitrator to grant him or her the power to rule that although the particular offense was committed, just cause for the discharge does not exist.

The court of appeals in the instant matter went on to find that the contract did not preclude the arbitrator from determining that just cause should include an unambiguous warning that disciplinary policies will be strictly enforced. It also found that nothing in

the arbitrator's decision nullified any portion of the contract. "The warning and dismissal provision has not been nullified, but merely interpreted in light of industrial practice and principles of just cause. The district court is not free to reject that interpretation." (App. A at 9a)

The Court of Appeals for the Third Circuit denied Super Tire's petition for rehearing and rehearing in banc (App. B at 11a-12a) and the Company then filed a Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CONFORMS TO ACCEPTED PRINCIPLES OF JUDICIAL REVIEW OF LABOR ARBITRATION AWARDS.

It is well established that the system of labor arbitration should be encouraged and that courts should pay great deference to decisions of labor arbitrators. United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); W.R. Grace & Co. v. Local Union 759, --U.S.--, 103 S.Ct. 2177 (1983). In the instant case, the arbitrator did nothing more in rendering his decision than interpret the various provisions of the

collective agreement. The Court of Appeals for the Third Circuit correctly upheld his decision, stating, "The parties bargained for the arbitrator's construction of the contract and should be bound by it." (App. A at 9a-10a, citing W. R. Grace & Co., 103 S.Ct. at 2182; Enterprise Wheel, 363 U.S. at 599; Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1125 (3rd Cir. 1969).)

There is nothing in the collective bargaining agreement which prohibits the arbitrator from interpreting it as he did. As noted above, the contract states that, "No employee may be discharged or suspended without just cause." (App. F at 64a) Elsewhere, it states that certain offenses, including drinking during working hours, are "causes for dismissal

without first discussing the matter with the Business Agent" and do not require that the employee be given "at least one written warning" before dismissal. (App. F at 64a-65a) There is no provision whatever which equates the causes for immediate dismissal without consultation with the Business Agent with just cause for discharge.

While the arbitrator recognized that commission of one of the "cardinal sins" subjects an employee to different considerations than commission of other offenses, he found that the "just cause" requirement must be met in any situation. (App. E at 40a) Courts of appeals which have considered this issue have uniformly held that an arbitrator is within his or her authority in making such a deter-

mination. Arco-Polymers, Inc., 671 F.2d at 756-57; Chauffeurs, Teamsters and Helpers, Local Union No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716 (8th Cir. 1980). Cf. Kewanee Machinery v. Local Union No. 21, 593 F.2d 314 (8th Cir. 1979)(Decision of arbitrator ordering reinstatement upheld where contract stated in one place that management had sole right to discharge employees and elsewhere that discharge must be for proper cause and where employer's absenteeism policy provided for discipline of employee who had the number of absences which the grievant was found to have had.); Falls Stamping & Welding Co. v. UAW, Local 1194, 575 F.2d 1191 (6th Cir. 1978)(Decision of arbitrator ordering reinstatement of wildcat

strikers upheld where contract provided that employees engaged in such a strike were subject to discharge but also provided that discipline for such misconduct was subject to the grievance procedure.); Timken Co. v. United Steelworkers of America, 492 F.2d 1178 (6th Cir. 1974)(Decision of arbitrator ordering reinstatement upheld where contract reserved for management its traditional rights, which the court found would include "formulat[ing] unilaterally rules of conduct and penalties for violations," 492 F.2d at 1179, and also gave arbitrator right to decide if discharge was improper or without just cause. The arbitrator found the employee to have committed the charged misconduct but ruled that termination was too severe a

penalty.); IAM v. San Diego Marine Construction Corp., 620 F.2d 736 (9th Cir. 1980)(Decision of arbitrator ordering reinstatement upheld where arbitrator found the employee guilty of insubordination such as to create just cause for discipline but ruled that discharge was too severe).

Having determined that "just cause" was required to sustain the discharge in the case at bar, Arbitrator Carey applied traditional arbitral considerations to the case. First, he noted that there had been no prior instances of an employee being discharged for violation of the drinking prohibition. Second, he noted that when this employee was disciplined previously for an incident involving drinking, the penalty imposed was a one-

day suspension and the employee was simply reminded of the prohibition on drinking without being told that discharge would follow if he violated the rule again. Finally, the arbitrator referred to the employee's thirteen year employment history with Super Tire and pointed out that the only prior discipline which was raised against him was the one-day suspension. (App. E at 40a-43a) Based on these considerations, he determined that there was not just cause for discharge but that the appropriate penalty was a four month suspension and a final warning regarding future misconduct of this sort. (App. E at 44a)

Respondent respectfully disagrees with the assertion of the petitioner that

the arbitrator's decision nullified any portion of the contract. The provision of the collective agreement dealing with progressive discipline states that except in the case of employees charged with one of the "cardinal sins," each employee is entitled to a written warning before he can be dismissed or suspended. (App. F at 65a) Super Tire errs when it asserts that Arbitrator Carey nullified this portion of the contract by pointing to the failure of the Employer to put the employee here on notice that violation of the drinking prohibition would result in his discharge. The notice requirement which the arbitrator raised is in the nature of a procedural right as opposed to the substantive right existing for lesser forms of misconduct which gives

employees the equivalent of one such act of misconduct with no penalty beyond a warning. It is noteworthy in this regard that the arbitrator did not rule that all employees charged with commission of one of the specified offenses are entitled to a prior warning but rather held that this particular employee, who had a relatively good record during thirteen years of employment, was entitled to be put on notice that a prohibition which had not led to any discharges in the past would lead to his discharge if violated.

It must also be recognized that Arbitrator Carey did not reduce the discipline imposed for one of the "cardinal sins" to that which is specified as appropriate for other types of misconduct. The contract requires that

an employee charged with a non-specified offense receive only a written warning in the first instance and goes on to require that the written warning be removed from his record after six months. (App. F at 65a-66a) Here, in contrast, the arbitrator ordered that the employee suffer a four month suspension and that he be placed on final warning that similar misconduct in the future would result in his discharge. (App. E at 44a)[2]

Arbitrator Carey did nothing more than determine that just cause was required to sustain the discharge and that such just cause was not demonstrated. He applied the considerations which arbitrators normally

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[2]Although Super Tire claims that the employee was previously charged with the same offense, the arbitrator noted that the record was unclear as to whether the previous discipline was for drinking on

apply in making such a decision and he substituted a severe penalty for the ultimate penalty in industrial relations. The Company and the Union agreed that matters such as the discipline of Mitchell Gray would be decided by an arbitrator and they must both live with that agreement. "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends." Safeway Stores v. American Bakery and Confectionery Workers, 390 F.2d 79, 84 (5th Cir. 1968).

II. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Petitioner cites as a ground for granting a writ of certiorari a supposed

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Company property or for failing to leave the area when ordered to do so. (App. E at 40a)

conflict between the decision of the Third Circuit here and prior decisions from other circuits. A careful examination of the cases cited by petitioner shows that no such conflict exists. In Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977), the court overturned an arbitration award which reinstated an employee who had failed to settle bills and funds within a specified period. The contract there specifically stated that such conduct constituted just cause for discharge. Id. at 693-694. Similarly, in International Union of Operating Engineers, Local 670 v. Kerr-McGee Refining Corp., 618 F.2d 657 (10th Cir. 1980), the court reversed an arbitrator's award of reinstatement when the arbitra-

tor had determined that the employee abused sick leave and made false statements to obtain benefits and the contract specifically provided that such conduct "will be cause for discharge." Id. at 658. Likewise, the arbitrator was reversed in Morgan Services, Inc. v. Local 323, --F.2d--, 115 LRRM 2368 (6th Cir. 1984)(App. G at 73a-89a). In that case, the arbitrator ruled that an employee was guilty of insubordination but ordered his reinstatement notwithstanding a provision of the contract stating that an employee was subject to discharge without redress if proven guilty of insubordination. (App. G at 78a-80a) In the instant case, there is no contractual provision denying an employee charged with drinking on the job

the right to seek redress through arbitration nor is there any provision stating that such an offense constitutes the necessary "just cause" for discharge.

The other cases cited by petitioner likewise fail to disclose a conflict between the circuits. In International Brotherhood of Firemen v. Nestle Co., 630 F.2d 474 (6th Cir. 1980), the arbitrator was reversed for ordering reinstatement of an employee who was found guilty of insubordination under a provision stating that insubordination "shall constitute cause for dismissal." Id. at 475-76. The arbitrator's opinion incorrectly stated that the contract provided that "insubordination may be just cause for discharge" and used this manufactured

permissiveness to justify reinstatement. Id. at 476. Here, there has been no assertion that Arbitrator Carey misstated the contract; Super Tire simply claims that he misapplied it.

In Buckeye Cellulose Corp. v. District 65, UAW, 689 F.2d 629 (6th Cir. 1982), the arbitrator was also overruled. The arbitrator there first ruled that the employer had not violated any provision of the contract by discharging an employee but then reduced the penalty to a suspension, apparently because he felt that the employer had acted unfairly in refusing the union certain information with which to prepare for the arbitration. Id. at 629-30. The court found that reliance on notions of "fundamental fairness" was improper where the arbitra-

tor determined that the discharge did not violate the contract. Id. at 630-31. In the present case, the arbitrator specifically ruled that the discharge of Mitchell Gray under all the circumstances was not proper under the contract. (App. E at 43a)

Finally, the petitioner cites Amanda Bent Bolt Co. v. UAW, 451 F.2d 1277 (6th Cir. 1971). The arbitrator there was reversed for ordering employees reinstated after their participation in an illegal strike, which the contract said "may be made the subject of disciplinary action, including discharge." Id. at 1279. The arbitrator based his award on the employer's action in suggesting that the dischargees apply for re-employment as new hirees, which he

found to suggest that the discharges were an improper punitive measure. Id. at 1280. In the instant case, the arbitrator did not raise any similar employer conduct after the discipline was imposed but relied solely on the contract and the events leading to the discharge. Additionally, Amanda predates most of the cases cited here and appears to have been largely limited to its facts by subsequent Sixth Circuit decisions in Timken Co. and Falls Stamping & Welding Co.

The decision of the Third Circuit in the instant case does not create a conflict among the circuits. The court followed accepted principles of law in finding that the question before it was limited to a determination of whether the

award "'draws its essence from the collective bargaining agreement.'" (App. A at 6a, quoting W.R. Grace & Co., 103 S.Ct at 2182 and Enterprise Wheel, 363 U.S. at 597.) Having properly found that it did so, the court upheld the arbitrator's decision, consistent with the teachings of this Court and with prior decisions of the other circuits.

CONCLUSION

It is respectfully requested that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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